91-1510

No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL J. SULLIVAN,

*Petitioner,*

v.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
a corporation,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I.

Under Section 455 of the Judicial Code does a United States District Court Judge have a responsibility to directly and fully disclose facts underlying her spouse's attorney-client relationship with a party to the litigation?

II.

Under Section 455 of the Judicial Code does a party litigant's payments of attorney's fees to the spouse of a United States District Court Judge constitute a "financial interest" mandating disqualification of the United States District Court Judge from cases involving that party litigant?

III.

Under Section 455 of the Judicial Code is the spouse of a United States District Court Judge who is currently providing legal representation to a party litigant in other major litigation considered to be an "adviser" to or "active participant in the affairs of" that party litigant thereby requiring disqualification of that United States District Court Judge?

IV.

Under Section 455 of the Judicial Code is an Appellate Court's finding that a party has failed to hold an evidentiary hearing, a hearing not even contemplated by the judicial code, actually a finding of waiver of the provisions of Section 455, a waiver which is expressly prohibited by the language of Congress in Section 455?

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**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit is reprinted as Appendix A. This 19 page opinion was ordered not published pursuant to Sixth Circuit Rule 24. It affirms a judgment of the United States District Court for the Eastern District of Michigan. The trial court's post trial order denying Petitioner's Motion to Vacate the Judgment is reprinted as Appendix C.

## JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 25, 1991. Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The court below entered an order denying the petition on December 19, 1991. This petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon Section 1254(1) of the Judicial Code [28 U.S.C. Sect. 1254(1)].

## STATUTES INVOLVED

The relevant statute involved is Section 455 of the Judicial Code (28 U.S.C.) as follows:

Sect. 455 Disqualification of justice, judge or magistrate

(b) He shall also disqualify himself in the following circumstances:

(4) He knows that he . . . or his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding or any other interest that could be substantially affected by the outcome of the proceeding;

(d)(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as a director, adviser, or other active participant in the affairs of a party.

(e) No justice, judge or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the

ground for disqualification arises only under subsection (a) waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

## STATEMENT OF THE CASE

### SUMMARY OF FACTS:

Petitioner brought a claim for compensation pursuant to the Federal Employers Liability Act (FELA), 45 U.S.C. Sect. 51-60, for injuries sustained at work on May 13, 1987.[1]

Petitioner injured his right knee as a result of a defective coupler operating mechanism on a railcar. When the mechanism failed to operate properly the Petitioner was required to manually attempt to adjust the coupling mechanism. While performing this function, the knuckle component of the coupler fell out and Petitioner jumped back to avoid it. In doing so, he fell over the rail and injured his knee.

At trial, Petitioner presented evidence from treating physicians that Petitioner had sustained a serious and disabling injury. Defendant countered this with an examining physician it chose and a hired expert, Dr. Wolf. Petitioner's retained expert, Dr. Eisenman was barred by the trial court.

On July 29, 1989, the jury found for the Petitioner in the amount of $40,000.00. Judgment was entered on the

[1] Jurisdiction was invoked under the provisions of Title 45 U.S. Code Sec. 56 and Title 28 U.S. Code Sec. 1331.

verdict on July 31, 1989. Post trial motions were filed and denied by written orders dated December 28, 1989. The post trial motions requested that the judgment be vacated, or a new trial on the issue of damages, or in the alternative a new trial on all issues.

The issues raised include several discretionary rulings of the trial court (for instance, barring an important medical witness for Petitioner, mentioning collateral source benefits before the jury, and an improper damage instruction) which Petitioner claimed had a significant impact on the jury's low damage award.

**HISTORY OF THE DISQUALIFICATION ISSUE:**

At the time of the Final Pretrial Hearing on November 15, 1988, defendant's counsel told Petitioner's counsel outside the presence of the trial judge, that Judge Hackett's husband had occasionally represented the CSX in FELA cases. The relationship was never disclosed by the trial judge, nor ever discussed in the trial judge's presence.

On the second day of trial in July 1989, the trial Court's clerk approached trial counsel during a recess and presented them with a handwritten stipulation on yellow legal pad which stated "Petitioner is aware that Judge Hackett's husband is an attorney who represents CSX Transportation and he waives any objections to her presiding over this case." and asked the Petitioner's counsel to initial it.

Petitioner's counsel initialed it and thereafter it became part of the Final Pretrial Order.

Petitioner filed a post trial motion to Vacate the Judgment arguing that the trial court had a mandatory obligation pursuant to 455(b) to recuse herself and that such

an obligation could not be waived by a party at any time. Petitioner relied upon the spouse's employment as an attorney for CSX and the definition of financial interest in 455(d)(4) as follows:

> " 'financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party . . ."

The Respondent's response to this motion noted that the trial court's spouse, "does very little Federal Employees (sic) Liability Act . . . litigation work of any kind for Defendant" and "Judge Hackett's husband represents Defendant, but in matters totally unrelated to this case. Further, his law firm, Frasco, Hackett & Mills, upon information and belief, has a substantial number of clients and receives only a small portion of its total income from Defendant" [Vol. I, R. 104]."

Petitioner's Motion to Vacate the Judgment explained his failure to request disqualification earlier pointing out that he was unaware of the specifics of Sect. 455 and believed his only remedy was a 28 U.S.C. Sec. 144, actual prejudice motion. Such a motion must be timely. The Motion to Vacate also pointed out that the trial judge never personally revealed the specifics of her spouse's relationship with Respondent. The motion also requested transfer "for further discovery and a new trial." [Vol. I, R. 100]. Petitioner's motion pointed out that Sect. 455(b) cannot be waived and the trial court cannot even request such a waiver.

The trial court, in its only acknowledgment of her spouse's relationship to Respondent CSX, stated in its December 1989 order that, "The judge's spouse, an attorney, is at time retained by the defendant to represent

it in specific cases and matters, as are other attorneys in the legal community. He is not in-house counsel nor is he paid a retainer. He has not participated in this matter in any way." [R. 21]

After filing of the post trial Motion to Vacate, Petitioner discovered that Martindale-Hubbell Law Directory had listed the CSX as a primary representative client for the trial court's spouse for three consecutive years. The trial court's spouse represented three other railroads and is a past president and current member of the National Association of Railroad Trial Counsel. The trial judge was a member of her husband's firm prior to her appointment to the United States District Court in 1986.

During briefing on the post trial motions, Petitioner noticed a recent opinion of the Sixth Circuit Court of Appeals, *CSXT v. Pitz Director of Dept. of Transportation of State of Michigan*, 883 F.2d 468 (1989) (Cert. Denied 3/19/90 at 110 S.Ct. 1480), challenging the constitutionality of a Michigan statute relating to railroads. The attorneys of record included a CSX attorney from its corporate headquarters and the trial court's spouse and her daughter. This was the first petitioner had any knowledge that not only was the Court's spouse receiving income from the Respondent, but so was her daughter.

The Sixth Circuit's opinion acknowledges that if Respondent CSX was a material client a financial interest could exist. It concluded that:

> "CSX is listed as a client in Mr. Hackett's firm's listing in Martindale Hubbell for 1987, 1988, and 1989, and four of the first five clients listed are railroads. Moreover, Mr. Hackett represented CSX in major litigation at the time this case was going to trial. Nevertheless, we think Sullivan has failed to show a sufficient financial interest to warrant reversing the

> district court's decision to deny the motion to vacate the judgment. We are aware of Sullivan's difficulty in trying to prove that the district court has a financial interest in this case, or in the defendant corporation, based upon Mr. Hackett's representation of CSX, without detailed disclosure from the district judge of the extent of her husband's relationship to the railroad. Sullivan had the burden of proof, however, and he could have met this burden by calling as witnesses representatives of CSX who assign CSX's legal work. He also could have called Mr. Hackett to testify as to his relationship with CSX . . . We cannot say, merely on the basis of Sullivan's argument, that this relationship constituted a material financial interest requiring the judge to recuse herself." [Pg. 11 of Opinion]

The opinion also concludes that "adviser" within the meaning of the 455(d)(4) financial interest section was not intended to cover the attorney-client relationship between the trial court's attorney-spouse and the Respondent corporation (and the spouse's client) who is appearing before it—provided the attorney-spouse and the client-party's relationship involves advice on matters not related to the precise litigation before the trial court.

Since the opinion suggested that a "sufficient" financial interest had to be proved and that Petitioner (as opposed to the trial court and Respondent who knew the true facts) had a burden of proving the material financial interest, Petitioner filed a Petition for Rehearing. The Petition not only challenged the Court's conclusion and requirement of a "sufficient" financial interest but urged the Court, as an alternative, to remand this matter to the trial court for a hearing on the extent of the professional and financial relationship between the Respondent CSX and the trial court's spouse and daughter. It also suggested that since Respondent CSX was before the

Court and would know exactly how much money CSX was paying to the trial court's spouse and daughter during the time period involved, the CSX could and should be ordered to produce the information in the Court of Appeals to determine if the amount of money constitutes a "sufficient" financial interest.

The Petition for Rehearing was denied.

## REASONS FOR GRANTING THE WRIT

### I.

### A UNITED STATES DISTRICT COURT JUDGE SHOULD BE REQUIRED TO MAKE FULL DISCLOSURE OF THE CIRCUMSTANCES SURROUNDING HER SPOUSE'S PROFESSIONAL AND FINANCIAL RELATIONSHIP WITH A PARTY.

The impact of the decision below is such that under its holdings a United States District Court Judge is *not* required to personally make full disclosure of the circumstances surrounding a spouse's professional and financial relationship with a party. Petitioner submits that this is not the intent of the United States Judicial Code.

Indeed, the Federal Judiciary is held to a higher standard than that expressed in the opinion below. Petitioner relies on this Court's recent opinion in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194 (1986). This Court, reviewing the 455(a) provision on this disqualification statute stated:

> "These facts create precisely the kind of appearance of impropriety that §455(a) was intended to prevent. The violation is neither insubstantial nor excusable. Although Judge Collins did not know of his fiduciary

> interest in the litigation, he certainly should have known. In fact, his failure to stay informed of this fiduciary interest, may well constitute a separate violation of §455. See §455(c). Moreover, providing relief in cases such as this will not produce injustice in other cases; to the contrary, the Court of Appeals' willingness to enforce §455 may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered."

and in footnote 8:

> "Petitioner's argument ignores important differences between subsections (a) and (b)(4). Most importantly, § 455(b)(4) requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety. See § 455(d)(4); *In re Cement and Concrete Litigation*, 515 F.Supp. 1076 (Ariz. 1981), mandamus denied, 688 F.2d 1297 (CA9 1982), aff'd by the absence of quorum, 459 U.S. 1191, 103 S.Ct. 1173, 75 L.Ed.2d 425 (1983). In addition, §455(e) specifies that a judge may not accept a waiver of any ground for disqualification under §455(b), but may accept such a waiver under §455(a) after 'a full disclosure on the record of the basis for disqualification.' Section 455(b) is therefore a somewhat stricter provision, and thus is not simply redundant with the broader coverage of §455(a) as petitioner's argument posits."

The Court below did not enforce the clear meaning of Sections 455(b)(4) and (d)(4). Moreover, it was unwilling to find out just how extensive a financial interest is involved by remanding this matter for an evidentiary hearing.

The procedural history of this Court's recent decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S.

847, 108 S.Ct. 2194 (1986), illustrates the serious errors of the opinion below. In *Liljeberg*, the trial court denied the original motion to vacate the judgment. The Fifth Circuit, in an unpublished opinion, remanded for an evidentiary determination of additional facts deemed relevant to recusal, 747 F.2d 1463 (1984). The second opinion of the Fifth Circuit, which was published (796 F.2d 769), and which vacated the judgment, noted the following rationale for remand in the unpublished opinion:

> "the judiciary must be governed by the appearance as well as the reality of disinterested adjudication," 796 F.2d at 799.

Petitioner, a railroad brakeman, is entitled to the *reality* of disinterested adjudication. A reversal of the lower court opinion on the Record before this Court and/or a remand for evidentiary hearing serves justice and that purpose.

The purpose of the Judicial Code's disqualification provisions are to insure that circumstances surrounding a trial court or its spouse's relationship are fully revealed. The opinion below undermines that purpose. The fact the opinion is unpublished is unimportant. Impartial judges are required in every case—not just published opinions.

## II.

**THE RECEIPT OF ATTORNEYS FEE'S BY THE SPOUSE OF A UNITED STATES DISTRICT COURT JUDGE SHOULD CONSTITUTE A "FINANCIAL INTEREST" WITHIN THE SCOPE OF SECTION 455 MANDATING DISQUALIFICATION OF THE UNITED STATES DISTRICT COURT JUDGE IN CASES INVOLVING THE PARTY REPRESENTED BY THE SPOUSE.**

455(b)(4) provides that a judge shall disqualify herself when she or her spouse "has a financial interest in the subject matter in controversy *or in a party to the pro-*

*ceeding* . . ." (emphasis added). However, the impact of the lower Court's opinion herein is such that now the financial interest of the trial judge must only be "sufficient" or "material" thereby eliminating the "however small" limitation of 455(d)(4).

The simple question becomes whether Judge Hackett's husband has a financial interest as defined by 455(d) in the Respondent CSX. Financial interest pursuant to 455(d)(4) is defined as "a legal or equitable interest, however small, or a relationship as a director, adviser or other active participant in the affairs of a party . . .". 455(b) and (d)(4) mandate recusal anytime a financial interest exists—regardless of its extent.

The trial court's spouse clearly has a legal or equitable interest, however small, in Respondent CSX. Since the trial court's spouse was performing professional services for which Respondent CSX owed compensation to the trial court's spouse, then that obligation alone creates a financial interest, however small. The fact Respondent has engaged the attorney services of the trial court's spouse for monetary compensation throughout the pendency of Petitioner's case before the trial court is manifestly a legal or equitable interest in the party. Moreover, the ruling below has erroneously removed the "however small" limitation from the Statute. That statutory language intends the opposite of the Court's ruling requiring proof of a "material" or "sufficient" financial interest.

The only reported ruling on similar facts, *Diversifoods v. Diversifoods*, 599 F.Supp. 133 (1986), discusses the recusal policy of a trial judge whose husband was a partner in a very large Chicago law firm (Mayer, Brown & Platt). In *Diversifoods* the attorney-spouse's firm—not the spouse—had previously represented the party on an un-

related matter and was not currently representing the party. The trial judge did not recuse herself. Here, the trial judge's spouse represented the Respondent in at least one major litigated case during the pendency of this case. Respondent is also listed as a representative material client in Martindale-Hubbell for the spouse's much smaller law firm—a law firm in which he is the only partner who specializes in railroad law. The trial judge in *Diversifoods* would likely recuse on the known facts in this case. Other than this trial court's opinion, no other decision addresses the issues involved here.

Petitioner should know the reality of the trial judge's financial interest in Respondent and where any exists no matter how small, the judgment should be vacated and a new trial ordered.

## III.

**THE SPOUSE OF A UNITED STATES DISTRICT COURT JUDGE WHO REPRESENTS A PARTY LITIGANT IN OTHER MAJOR LITIGATION SHOULD BE CONSIDERED TO BE AN ADVISER OR ACTIVE PARTICIPANT IN THE AFFAIRS OF THAT PARTY LITIGANT THEREBY MANDATING THE DISQUALIFICATION OF THE UNITED STATES DISTRICT COURT JUDGE UNDER THE PROVISIONS OF SECTION 455 OF THE JUDICIAL CODE.**

The trial court's spouse was also an "adviser" to Respondent CSX. Advice is the most important service that a lawyer can give. As Abraham Lincoln said: "A lawyer's time and advice are his stock in trade." No reported case purports to define what constitutes "adviser", but its generic classification suggests a broad interpretation was intended. Indeed, it would appear to apply to advisers regardless of whether the adviser was compensated or not. The thrust of the Statute focuses on the existence of a relationship. An attorney has a confidential, trusting,

fiduciary, advisory relationship with his client. The trial court's spouse was an adviser to Respondent. The lower court's opinion, which restrictively interprets this provision, is erroneous.

Equally clear is that a trusted attorney who represents a party challenging the constitutionality of a state statute in the District Court and the Court of Appeals is a person who is "an active participant in the affairs of a party." An attorney speaks for the party, his words can bind a party or constitute an admission on behalf of a party. An attorney surely actively participates in the affairs of a party. Because *CSXT v. Pitz* was a reported appeal, this is the only case title known to Petitioner in which the trial court's spouse was the Respondent's attorney. The admissions of Respondent and the trial court clearly indicate there are other cases and the listing of Respondent CSX as a representative client for several years by the trial court's spouse indicates an ongoing relationship. Because neither Respondent nor the trial judge have revealed the number of cases involved, the hours spent, or the fees charged by the trial court's spouse and paid by Respondent; the amount of the financial interest, the extend of the adviser relationship with CSX, and the frequency of active participation in the affairs of CSX, is not *now* known.

## IV.

## FAILURE TO HOLD AN EVIDENTIARY HEARING NOT EVEN CONTEMPLATED BY THE JUDICIAL CODE CANNOT BE INTERPRETED TO BE A WAIVER BY A PARTY OF THE PROVISIONS OF SECTION 455 WHEN CONGRESS HAS EXPRESSLY STATED THAT THE PROVISIONS OF SECTION 455 SHALL NOT BE WAIVED.

Since the opinion below imposes upon the petitioner the burden of proving a financial interest, if he fails to re-

quest a hearing he has waived a disqualifying circumstance that Congress has declared cannot be waived. This is not the intent of Congress in drafting the Judicial Code since Congress clearly stated in Section 455(e) that these circumstances cannot be waived.

*Liljeberg*, like numerous other lower court decisions, and the statute itself, emphasizes full disclosure of facts bearing on the trial court's impartiality. Yet, in the case at bar, the United States District Court Judge sought and accepted an alleged waiver of these grounds. The Court of Appeals then stated that such a waiver should not be sought and cannot be accepted but then proceeded to decide this case based upon what it claims are the absence of necessary facts in the Record. It is the trial judge who has duty to reveal those facts and circumstances. Prior to trial, the trial court did not disclose any detailed facts. In response to Petitioner's Motion to Vacate, the trial court's Order disclosed no additional fact other than those contained in the handwritten waiver tendered by the clerk. Instead, the Order states conclusions—not facts—and the admonition that Petitioner need have "no concern" for the situation. This is not full disclosure as contemplated by the statute.

Section 455 requires the trial court to disclose facts. To the extent the decision below requires Petitioner to prove the amount or extent of the "financial interest," that decision erroneously permits waiver of a 455(b) violation.

## CONCLUSION

The issues here have substantial importance to a fair and impartial judiciary, but more importantly, they have substantial importance to Petitioner because he should know whether the many discretionary rulings the trial court found in favor of Respondent were the decisions of an objective and impartial judge or a judge whose spouse receives income from Respondent, advises Respondent, and actively participates in the affairs of Respondent.

Accordingly, for the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted. In the alternative, Petitioner requests such other relief which this Court deems appropriate.

Respectfully submitted,

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Dated: March 16, 1992

# APPENDICES

# APPENDIX A

Not for Publication

[Filed October 25, 1991]

Nos. 90-1136; 90-1412

THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL J. SULLIVAN,

Plaintiff-Appellant,

v.

CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Michigan.

Before: JONES and RYAN, Circuit Judges; and BROWN, Senior Circuit Judge.

RYAN, Circuit Judge. Plaintiff Michael Sullivan seeks a new trial on damages only in this action brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, and the Federal Safety Appliance and Equipment Act, 45 U.S.C. § 1 *et seq.* The issues are whether the district court erred in:

1. Refusing to allow plaintiff to call a medical expert not listed in the final pretrial order;

2. Refusing to vacate the judgment upon grounds challenging the court's qualification to hear the case;

3. Refusing to grant a mistrial following defense counsel's reference to collateral benefits; and

4. Refusing to give plaintiff's tendered jury instructions.

We hold that the district court committed no prejudicial error or abuse of discretion warranting reversal and, therefore, affirm.

I.

Plaintiff Michael Sullivan was a fourteen-year employee of defendant Chesapeake & Ohio Railroad, now known as CSX Transportation. On May 13, 1987, Sullivan injured his leg and knee when he attempted to open a coupling knuckle on one of defendant's rail cars. He did not return to work after the accident.

Over the next eighteen months, at CSX's request, Sullivan tried returning to work on several occasions but never worked more than two days because he would experience swelling and pain in his knee. His treating physician, Dr. Morrison, restricted him from work after each attempt to return during 1988 and 1989.

On December 10, 1987, Sullivan brought this action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, and the Federal Safety Appliance and Equipment Act, 45 U.S.C. §§ 1-32.

The following occurrences give rise to the several issues in this case, which we shall address *seriatim*.

A.

In an effort to have current medical information at trial, CSX requested a physical examination of Sullivan within forty-five days of trial which was scheduled to begin on

November 22, 1988. Because Sullivan objected, CSX obtained a court order for the examination. Dr. Wolf, who conducted the examination on October 7, 1988, concluded that Sullivan was able to return to work. Sullivan received Dr. Wolf's report on October 31, 1988.

After the final pretrial order was signed, Sullivan sought to depose Dr. Eisenman, who was not identified in the pretrial order, as an expert witness to rebut or contradict Dr. Wolf's report. CSX's motion to quash the deposition was denied by a magistrate-judge. The court, finding that Dr. Eisenman was not a necessary rebuttal witness and that it would be unfair to CSX to add another medical witness after the close of discovery, set aside the magistrate-judge's order and granted CSX's motion.

B.

The final pretrial order was filed at the pretrial conference on November 15, 1988. This order, signed by plaintiff's counsel, included the following statement:

> Plaintiff is aware that Judge Hackett's husband is an attorney who represents CSX Transportation and he waives any objections to her presiding over this case.

C.

Prior to trial, Sullivan moved in limine to exclude any reference to Sullivan receiving railroad retirement benefits. The court took the matter under advisement, promising to reconsider the subject if "any problems" should arise during trial. During the jury voir dire, plaintiff's counsel noted that workers' compensation benefits were not available to railroad workers. During direct examination of Sullivan, his counsel asked about specific benefits Sullivan was receiving. On cross-examination of Sullivan, defense counsel asked Sullivan whether he was receiving

any collateral source benefits. Plaintiff's counsel objected and the court admonished defense counsel not to pursue the matter.

D.

At trial, Sullivan presented the testimony of economist Michael Thomson who testified concerning Sullivan's projected loss of earnings from his railroad occupation. Later, Sullivan's counsel requested the court to instruct the jury in the language of Federal Pattern Jury Instruction 85.12. The instruction references the situation in which an economist testifies. Instead, the court used 85.11, an instruction intended for use when no economist testifies.

E.

The jury found that a violation of the Federal Safety Appliance and Equipment Act's coupler provisions caused Sullivan's injuries. The jury further found that the railroad's negligence caused his injuries, and that Sullivan was fifty percent contributorily negligent. The jury found that the gross amount of Sullivan's damages was $40,000 and the court entered judgment in that amount based upon the provisions of the Act.

After the verdict, Sullivan moved for a new trial on liability, and CSX moved for a new trial on damages. The district court denied both motions. The court also denied Sullivan's motion to vacate based on the judge's failure to *sua sponte* disqualify herself, pursuant to 28 U.S.C. § 455(b), due to a financial interest in the case.

II.

Sullivan argues that $40,000 in damages is inadequate to compensate him for his loss of earnings. He seeks a

new trial on damages only, contending that in light of the strong evidence in his favor, the verdict could be so low only because of the cumulative effect of the court's prejudicial errors. We now turn to those asserted errors.

A.

Sullivan contends that it was prejudicial error for the district court to refuse to modify the pretrial order to permit the testimony of his medical expert, Dr. Eisenman, when the court allowed CSX's medical expert, Dr. Wolf, to testify as to Sullivan's current medical condition, his prognosis, pre-existing injuries, and the treating physician's surgical report. CSX responds that the court did not abuse its discretion in refusing to modify the order as Dr. Eisenman was offered after the close of discovery and rebuttal was possible through Sullivan's two treating physicians, Drs. Morrison and Dubin.

In May 1988, CSX moved for a Fed. R. Civ. P. 35 medical examination to be scheduled after discovery was closed in order to provide a current record of Sullivan's condition for trial. The court ordered this examination to occur no later than forty-five days before trial in order to accommodate Sullivan's concerns of inadequate time to rebut the findings. Dr. Wolf conducted the court-ordered examination on October 7, 1988, forty-five days before trial was scheduled to begin. Dr. Wolf prepared a report on October 10 which was received by CSX on October 12 and sent to Sullivan on October 31. A subsequent video deposition was also given by Dr. Wolf.

On November 8, the final pretrial order was due. Dr. Wolf's name was included on the witness list, but Dr. Eisenman's was not. On November 17, Dr. Eisenman examined Sullivan. On the same day, plaintiff's counsel sent

defense counsel a letter identifying Dr. Eisenman as a witness to rebut or contradict Dr. Wolf.

CSX filed an emergency motion to quash the deposition of Dr. Eisenman. This motion was referred to a magistrate-judge who consulted the court's scheduling order to determine whether witnesses not identified in the pretrial order were permitted. The court's scheduling order provided that:

> If, after submission of the FPTO [Final Pretrial Order], it develops that other witnesses will or may be called to testify at the trial, their names and addresses and the general subject matter of their testimony shall be reported to other counsel at the earliest possible date. (This restriction shall not apply to rebuttal witnesses, the necessity of whose testimony cannot be reasonably anticipated before trial.)

The magistrate judge found that the order allowed Sullivan "to secure rebuttal evidence regarding the examination conducted on the person of Plaintiff by Defendant's doctor in October" and thus denied CSX's motion to quash the deposition of Dr. Eisenman. The court set aside the magistrate's order and granted CSX's motion because:

> Dr. Eisenman is not a necessary rebuttal witness and plaintiff is well beyond the discovery time allowed by this court. A deposition of a non-treating physician, who is not listed in the final pretrial order and who did not author a report until after the depositions of all medical witnesses who were listed in the final pretrial order, is unfair and prejudicial to defendants.

Because the trial date was postponed, the court later ordered a second medical examination by Dr. Wolf to update the court on Sullivan's condition.

The district court has broad discretion to modify or enforce a pretrial order and its rulings will be reversed on appeal only for an abuse of discretion. *Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1019 (11th Cir. 1982). "[T]hese orders and stipulations, freely and fairly entered into, are not to be set aside except to avoid manifest injustice." *Sherman v. United States*, 462 F.2d 577, 579 (5th Cir. 1972) (citing Fed. R. Civ. P. 16). Amendments are permitted "where no substantial injury will be occasioned to the opposing party, the refusal to allow the amendment might result in injustice to the movant, and the inconvenience to the court is slight." *Id.*

No injustice to the movant occurs when the court prohibits a witness not listed on the witness list from testifying in order to contradict the opponent's testimony where the offering party knew his opponent would present evidence on the issue. *Jackson*, 678 F.2d at 1019. This is especially true where a movant, such as Sullivan, makes no offer of proof at trial regarding the excluded testimony. *Id.* As this was a FELA action involving an inability to work due to a work-related accident, Sullivan knew that his medical condition was at issue and, prior to entry of the pretrial order, he knew that CSX would offer evidence of his medical condition through the expert medical testimony of Dr. Wolf. The availability of Drs. Dubin and Morrison to contradict Dr. Wolf's findings suggests that Sullivan would suffer no injustice as a result of the court's ruling. Sullivan's complaints focus on Dr. Wolf's critique of Dr. Morrison's report, Dr. Wolf's comments on Sullivan's history, and the cause of the accident. Dr. Morrison was qualified to respond to all of those matters. Sullivan thus failed to show manifest injustice. Additionally, Sullivan failed to show that "no substantial injury [would] be occasioned to the opposing party." *Sherman*, 462 F.2d at

579. The court explicitly found that "[a] deposition of a non-treating physician, who is not listed in the final pretrial order and who did not author a report until after the depositions of all medical witnesses who were listed in the final pretrial order, is unfair and prejudicial to defendants." Considering the availability of other medical witnesses and the potential prejudice to CSX, the court did not abuse its discretion by refusing to allow Dr. Eisenman to testify.

B.

Plaintiff's counsel signed a stipulation contained in the final pretrial order which stated that "plaintiff is aware that Judge Hackett's husband is an attorney who represents CSX Transportation and he waives any objections to her presiding over this case." After the verdict, plaintiff filed a motion to vacate the judgment, pursuant to 28 U.S.C. § 455(d)(4), based on his belief that the court had an impermissible "financial interest" in the case. The court denied this motion, stating that

> [t]his section simply is not applicable to the trial judge in this case. Her spouse has no financial interest in the subject matter in controversy or any party to the proceedings, or any other interest that could be substantially affected by the outcome of the proceeding. The judge's spouse, an attorney, is at times retained by the defendant to represent it in specific cases and matters, as are other attorneys in the legal community. He is not in-house counsel nor is he paid a retainer. He has not participated in this matter in any way. Neither this judge nor her spouse will benefit from the outcome in this case.

A recusal motion is committed to the sound discretion of the district court. On appeal, we ask only whether the court abused its discretion. *The Chitimacha Tribe of Loui-*

*siana v. Harry L. Laws Co., Inc.*, 690 F.2d 1157, 1162 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983).

28 U.S.C. § 455(b)(4) provides that a judge shall disqualify herself when she knows that she or her spouse "has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." A " 'financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party." 28 U.S.C. § 455(d)(4). A party may not waive section 455(b) as it is a *per se* rule requiring recusal in particular circumstances. *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1527 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989). Plaintiff's counsel's signature on the pretrial order thus does not preclude plaintiff from raising the recusal issue now.

Sullivan contends that the trial judge has a financial interest in this case due to her husband's prior representation of CSX in other matters, her daughter's representation of CSX on at least one occasion, and her prior affiliation with her husband's firm. To meet the burden of showing financial interest, a movant must do more than allege that "law firms are interested in as many clients as they can get, that [the judge's husband's firm] would like to keep the defendant as a client, and that if the defendant loses this lawsuit, it will take its legal business elsewhere." *Diversifoods, Inc. v. Diversifoods, Inc.*, 595 F. Supp. 133, 139 (N.D. Ill. 1984); *see also Chitimacha*, 690 F.2d at 1166-67. It is conceivable that a showing could be made, in a proper case, that a court's spouse may have such a material relationship to a client that it may be said that a financial interest exists.

Sullivan contends that CSX was such a material client. CSX is listed as a client in Mr. Hackett's firm's listing in Martindale Hubbell for 1987, 1988, and 1989, and four of the first five clients listed are railroads. Moreover, Mr. Hackett represented CSX in major litigation at the time this case was going to trial. Nevertheless, we think Sullivan has failed to show a sufficient financial interest to warrant reversing the district court's decision to deny the motion to vacate the judgment. We are aware of Sullivan's difficulty in trying to prove that the district court has a financial interest in this case, or in the defendant corporation, based upon Mr. Hackett's representation of CSX, without detailed disclosure from the district judge of the extent of her husband's relationship to the railroad. Sullivan had the burden of proof, however, and he could have met this burden by calling as witnesses representatives of CSX who assign CSX's legal work. He also could have called Mr. Hackett to testify as to his relationship with CSX. Sullivan failed, however, to call any witnesses regarding the relationship between Mr. Hackett and CSX. We cannot say, merely on the basis of Sullivan's argument, that this relationship constituted a material financial interest requiring the judge to recuse herself.

Sullivan further contends that the judge should have recused herself because, by his repeated representation of CSX, Mr. Hackett was an "adviser" which constitutes a financial interest under section 455(b). In making this argument, Sullivan relies on *United States v. Amerine*, 411 F.2d 1130 (6th Cir. 1969), where the district judge in a criminal matter had been the United States Attorney during the preliminary proceedings against the defendant. This court found that recusal was necessary because the judge, when he was the United States Attorney, had been an adviser in the same case. Here, neither the district

judge nor her husband had any involvement with the case and thus were not CSX advisers. Moreover, because section 455(b)(5)(ii) clearly covers the lawyer-client relation by providing that a judge must recuse herself when she "or [her] spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person . . . [i]s acting as a lawyer in the proceeding," we are not convinced that the term "advisor" in section 455(4)(d) was also intended to cover this relationship. The fact that we reached a different result in *Amerine* may be explained by the subsequent amendment of section 455 to provide that judges formerly serving as government officials should recuse themselves from any matter that they participated in as a counselor or adviser. 28 U.S.C. § 455(b)(3). The case does not stand for the proposition that a judge must recuse herself if her spouse occasionally represents a party in other matters. We think Sullivan failed to show the existence of a formal interest under Section 455(b).

Sullivan does not raise, and therefore we do not address, whether recusal would have been required under section 455(a).

C.

Sullivan had moved in limine to keep out any reference to railroad retirement benefits. CSX responded that it did not intend to introduce evidence of the railroad retirement plan. The court took the matter under advisement and told CSX that "[s]hould something be introduced in plaintiff's case that makes you believe it would be appropriate to address that, I'll revisit this."

On direct examination, Sullivan's counsel elicited the following testimony from Sullivan:

> Q.: Okay. Now, Mr. Sullivan, you've received medical care and treatment. Who's paid the medical bills?

A.: Travelers Insurance Company.

Q.: And that's your—your employee fringe benefits insurance company?

A.: Right.

Q.: I just want it clear, you didn't pay for it?

A.: No.

Q.: While you've been off and not working, Mr. Sullivan, have you received any salary, wages or money from the railroad?

A.: No. The railroad hasn't given me any money at all since I've been off.

Q.: But just so the jury is clear, the occasions that you did return to work, you got paid for those?

A.: Oh, yes, the days I worked I got paid for.

Defense counsel, believing that plaintiff had opened the door by suggesting the *absence* of collateral source benefits, asked the following questions:

Q.: Now, Mr. Thompson asked you on direct that your medicals were paid for by Travelers, which is through your employer, and you're not claiming any medicals, correct?

A.: No. Travelers insurance has paid for everything.

Q.: And that's been through your employer?

A.: Yes.

Q.: And, then he said you weren't paid any wages by the railroad during this period of time?

A.: Other than the days I went back to work. I was paid for those days.

Q.: You're not telling this jury you didn't get any other types of benefits during that time, are you?

Plaintiff's counsel objected and the last question remained unanswered. At a bench conference, defense counsel ar-

gued that he was allowed to ask about collateral source benefits as plaintiff's counsel had opened the door by asking about benefits during direct examination and by his references to workers' compensation benefits during voir dire. The court ruled that because the "jury knows he's not out there with no income," the attorney should "[l]eave it alone." Plaintiff's counsel asked for, and was denied, a mistrial based on defense counsel's question about collateral source benefits.

Evidence of collateral source benefits is not admissible in FELA actions because such evidence "is readily subject to misuse by a jury." *Eichel v. New York Cent. R.R. Co.*, 375 U.S. 253, 255 (1963). "However, when the plaintiff makes specific reference to collateral source payments on direct examination, the scope of permissible inquiry is set by the direct examination and the usual rules on cross-examination apply." *Lange v. Missouri Pac. R.R. Co.*, 703 F.2d 322, 324 (8th Cir. 1983). The "usual rules on cross-examination" provide that "[c]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." *Lange*, 703 F.2d at 324 (citing Fed. R. Evid. 611(b)). In *Lange*, evidence that the plaintiff had received workers' compensation benefits was admissible to test the plaintiff's credibility when the plaintiff had testified on direct examination that he returned to work immediately after his surgery because he had to support his family and had no savings to fall back on. *Id.* Likewise, the court in *Gladden v. P. Henderson & Co.*, 385 F.2d 480, 483-84 (3rd Cir. 1967), *cert. denied*, 390 U.S. 1013 (1968), ruled that

> plaintiff on direct examination brought into the case an additional, affirmative element by testifying that he had returned to work and had not visited Dr. Krause again because he had fallen behind in the pay-

> ment of his bills and wanted to catch up on them and support his family. Defendant was not required to leave this testimony unchallenged and had the right to ask plaintiff on cross-examination whether he had received financial assistance, as affecting the credibility of his assertion. To have forbidden such cross-examination would have conferred on plaintiff the unparalleled right to give testimony on direct examination with immunity from inquiry on cross-examination. . . .[T]he collateral benefit rule cannot be made a springboard from which a plaintiff may go forward with affirmative evidence that he returned to work while he was still ailing, because of financial need and then seek immunity from cross-examination regarding it. The boundary of silence was crossed when plaintiff affirmatively presented on direct examination the reason why he had returned to work after seven weeks and had not again visited his physician. The trial court therefore was justified in opening the door for cross-examination for the narrow purpose of testing the credibility of plaintiff's assertion.

The court explicitly distinguished its case from *Eichel* where "the plaintiff had not affirmatively testified in such a manner as to warrant any effort at contradiction by cross-examination. Instead, defendant there attempted to introduce prejudicial evidence of disability pension payments simply because it was logically relevant on the extent and duration of the plaintiff's disability." *Id.* at 483. Collateral source benefits, then, may be a proper subject of cross-examination when the plaintiff's direct testimony erroneously states that he is not receiving any financial assistance.

CSX also contends that the door was opened by plaintiff's counsel mentioning workers' compensation during voir dire. In another FELA action where counsel argued

that FELA was the plaintiff's only possible remedy as he was ineligible for workers' compensation, the court commented that "ineligibility for workers' compensation benefits was completely irrelevant to the issues presented in this case, and allowing the jury to consider such information could have prejudiced the Railroad." *Stillman v. Norfolk & W. Ry. Co.*, 811 F.2d 834, 838 (4th Cir. 1987). As the court explained, "defendants in FELA cases are not permitted to inform the jury that a plaintiff has received benefits from a collateral source. We perceive no reason for a different rule when the plaintiff in a FELA case seeks to inform the jury of the absence of benefits from a collateral source." *Id.* (citations omitted). Plaintiff's counsel in this case likewise should not have informed the jury that FELA has different rules about workers' compensation and that the jury should listen carefully to the judge's instructions.

Plaintiff's counsel asked on direct examination whether the plaintiff had "received any salary, wages or money from the railroad." The plaintiff denied that he had received any money from the employer. Counsel also asked whether plaintiff's hospital bills were covered by his employer's insurance and implied that workers' compensation would not be available. These questions and comments arguably opened the door to inquiry about benefits. The court did not err in refusing to grant a new trial based on defense counsel's questions about collateral benefits.

D.

Plaintiff's counsel argues that the court erred by instructing the jury in the language of Federal Pattern Jury Instruction 85.11 instead of pattern instruction 85.12 as requested. Appellate courts accord district judges broad discretion in formulating jury charges as long as the in-

struction accurately reflects the law and facts. *United States v. Heffington*, 682 F.2d 1075 (5th Cir. 1982), *cert. denied sub nom., Giella v. United States*, 459 U.S. 1108 (1983). In reviewing the instructions, an appeals court must look at the charge in its entirety. *United States v. Smith*, 584 F.2d 759 (6th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979).

The instructions in dispute involve the concept of the present worth of loss of future earnings. Sullivan contends that the court should have given instruction 85.12 entitled "Alternative Instruction—Lost Wages and/or Earning Capacity—When Economic Experts Testify," as economist Michael Thomson had testified. The court instead gave instruction 85.11, "Damages—Present Worth of Future Loss." Both instructions tell the jury to reduce future loss to present worth. They differ in that 85.11 specifically tells the jury how to make this calculation and 85.12 instructs the jury that they may discount based on the economic principles discussed by the experts.

Sullivan does not contend that instruction 85.11 as given misstated the law or facts, only that he believes, in light of the expert testimony, that 85.12 was more appropriate. Instruction 85.12 and 85.11 both instruct as to reducing damages for future loss to present worth and are substantively similar. Laying aside the probability that neither instruction is entirely comprehensible to the average juror, we do not believe that the district court abused its broad discretion in utilizing 85.11 rather than 85.12.

## III.

We conclude that the district court committed no error warranting reversal and did not abuse its discretion in refusing to vacate the judgment upon the recusal issue. Therefore, we AFFIRM.

# APPENDIX B

[Filed December 19, 1991]

Nos. 90-1136/1412

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| MICHAEL J. SULLIVAN<br>Plaintiff-Appellant, (90-1136)<br>Plaintiff-Appellee (90-1412) | ) | |
| v. | ) | |
| | ) | ORDER |
| CHESAPEAKE & OHIO RAILWAY CO., A CORPORATION,<br>Defendant-Appellee, (90-1136)<br>Defendant-Appellant (90-1412) | ) | |

BEFORE: JONES and RYAN, Circuit Judges;
and BROWN, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ LEONARD GREEN, Clerk

# APPENDIX C

[Dated December 28, 1989]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL J. SULLIVAN,
Plaintiff,
vs.

Case No.
87-CV-74410-DT

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,
Defendant.
_____/

Hon.
Barbara K. Hackett

## ORDER DENYING MOTION TO VACATE JUDGMENT

Plaintiff Michael J. Sullivan, by his attorney Robert B. Thompson, "moves this court to disqualify itself" pursuant to 28 U.S.C. § 455(b)(4). Counsel complains that the judge's spouse "is an attorney of record for the Defendant in this cause—CSX or Chesapeake and Ohio Railway Company—in other pending FELA matters." The section relied on by plaintiff provides that a judge shall disqualify himself (or herself) when "he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."

This section simply is not applicable to the trial judge in this case. Her spouse has no financial interest in the subject matter in controversy or any party to the proceedings,

or any other interest that could be substantially affected by the outcome of the proceeding. The judge's spouse, an attorney, is at times retained by the defendant to represent it in specific cases and matters, as are other attorneys in the legal community. He is not in-house counsel nor is he paid a retainer. He has not participated in this matter in any way. Neither this judge nor her spouse will benefit from the outcome in this case. The judge's spouse has no role in this matter and this fact was known to plaintiff's counsel in advance of trial as evidenced by the stipulation attached to the final pretrial order. Counsel had no concern at the time and need have none now.

This case was tried to a jury. Counsel's objections to rulings of this court relative to preliminary motions and during the course of the trial are all a matter of record. Plaintiff's disappointment in the amount of the verdict rendered for him by the jury is not grounds for the relief he is seeking in this motion to vacate judgment.

In summary, careful review of the file in this case indicates that plaintiff's motion is without foundation and lacks merit. Counsel and the court met frequently prior to trial and during trial to resolve differences. Ample opportunity was afforded the parties to raise any concerns. A hard-fought case was presented to an attentive jury and the jurors arrived at a unanimous verdict, a verdict which this court holds is supported by the record in this case.

For the above reasons, plaintiff's motion to vacate judgment is denied.

Defendant's request for sanctions also is denied.

SO ORDERED.

/s/ BARBARA K. HACKETT
United States District Judge

Dated:
DEC 28, 1989

# APPENDIX D

[Dated August 7, 1989]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL J. SULLIVAN,

Plaintiff,

vs.

Case No. 87-74410

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Judge Barbara K. Hackett

Defendant.
_____/

MOTION TO VACATE JUDGMENT AND ALL PROCEEDINGS DUE TO TRIAL COURT'S FAILURE TO DISQUALIFY ITSELF PURSUANT TO 28 U.S.C. Sect. 455(b)

NOW COMES PLAINTIFF, Michael J. Sullivan, by his attorney, Robert B. Thompson, and moves this Court to a) disqualify itself pursuant to 28 U.S.C. Sec. 455(b)4; b) vacate all proceedings before it including judgment for Plaintiff; c) transfer said cause for further proceedings including discovery and trial; and d) invalidate any alleged waiver of said basis for disqualification pursuant to 28 U.S.C. Sec. 455(b)(4) since this Court had no authority to request or accept said waiver pursuant to 28 U.S.C. Sec. 455(e).

In support thereof, Plaintiff states:

1. 28 U.S.C. Sec. 455(b) identifies mandatory circumstances under which trial court must disqualify itself.

2. 28 U.S.C. Sec. 455(b) places the burden of disqualification on the trial court and does not, by its terms, provide for disqualification initiated by a party.

3. The notification by the trial court of circumstances requiring this trial court to disqualify itself occurred when Judge Hackett's clerk approached counsel during a break on the second day of evidence and presented for the first time Ex. 1 and requested both counsel to initial it. Plaintiff's counsel was in the midst of trial and was not prepared to fairly evaluate it.

4. Ex. 1 states the Trial Court's spouse is an attorney of record for the Defendant in this cause—CSX or Chesapeake and Ohio Railway Company—in other pending FELA matters. Plaintiff is still unaware of the extent and frequency of such representation.

5. The circumstances of the Trial Court's spouse being an attorney for CSX clearly violates subsection b(4) of 455 and constitutes a "financial interest" since an attorney is by definition an "adviser" or "participant" in the affairs of this corporate Defendant (CSX).

6. Subsection e of 455 prohibits this Trial Court from requesting or accepting a waiver of the grounds for disqualification under 455(b).

7. This motion is made pursuant to Sec. 455(b) and 455(e).

8. Ex. 1 states Plaintiff is "aware" of this situation to which Plaintiff states:

a) timeliness of this motion is *not* an issue under Sec. 455(b).

b) This Trial Court never stated or explained her spouse's relationship with the Defendant CSX except as identified by Ex. 1.

c) Ex. 1 is directed only to Plaintiff's waiver (not Defendant).

d) Plaintiff's counsel was "aware" of this situation as a result of statements by Defendant's counsel at or about the time of the Final Pretrial Conference. At that time, the Trial Court had already ruled unfavorably to Plaintiff by permitting defense medical expert testimony after discovery had closed and by denying Plaintiff any right to rebut that evidence—see Plaintiff's Motion for New Trial.

e) Plaintiff's counsel considered a motion alleging bias or prejudice (28 U.S.C. Sec. 144), but rejected it since there were no statements made of record. Further, in the 14 years Plaintiff's counsel had been an attorney he had *never* brought such a motion since he fears a motion based on belief or statements of others is likely to create more bias or prejudice from the mere bringing of the motion.

f) Further, Trial Court and Defendant had full knowledge of the relationship between Defendant and the Trial Court's spouse.

g) Plaintiff's counsel was at no time aware, had knowledge of, or was familiar with the specifics of 28 U.S.C. Sec. 455. Plaintiff's counsel *first* learned of the mandatory provisions of this section during discussions with the firm's appellate attorney, John J. Naughton, while preparing the Motion for New Trial.

9. The Trial Court failed to disqualify itself, failed to fully advise the Plaintiff's counsel directly of the relationship, and improperly requested and accepted a waiver of said disqualification.

WHEREFORE, Plaintiff requests that:

1. The judgment on behalf of Plaintiff be vacated.

2. All orders issued by the Trial Court be vacated.

3. That this Court invalidate the alleged waiver in Ex. 1 and disqualify itself; and

4. Transfer said cause for further discovery and a new trial.

Respectfully submitted,

/s/ ROBERT B. THOMPSON

/s/ JOHN J. NAUGHTON

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Ex. 1

Appendix

3. STIPULATION OF FACTS

4. Plaintiff is aware that Judge Hackett's husband is an attorney who represents CSX Transportation and he waives any objections to her presiding over this case.

## MEMORANDUM IN SUPPORT OF MOTION TO VACATE

Sec. 455(B) and the definition of financial interest contained therein clearly support the conclusion that this Court had an obligation on its own to disqualify itself.

Further, Congress by enacting subsection E took the very unusual step of not permitting any waiver by a party of the grounds for disqualification under Subsection 455(b). Clearly Congress felt it unfair to require the parties to be placed in a position where it must make any decision or even be asked to make any decision on waiving these grounds for disqualification.

The leading case on this matter in the 6th Circuit in *U.S.* v. *Amerine* 411 F2d 1130 (1969) in which the Defendant's motion for disqualification under the old 455 provisions was made at the conclusion of the trial. The motion was denied. The basis for disqualification was that the Trial Court had been a U.S. Attorney at the time the original charges were filed. That situation clearly violated 455 as does the situation here. Moreover, the trial Court personally advised Defendant of this fact prior to trial, on the record. On appeal, the Court ruled the trial judge erred and vacated all orders and proceedings which occurred before the disqualified judge. On this issue of timeliness, the Court stated:

> "The second reason argued to us for not reversing this case on the issue of disqualification is that appellant through counsel waived any disqualification claim. It is clear that appellant never suggested disqualification until the issue had been raised by the District Judge himself, and then the formal motion for disqualification was presented belatedly at the end of the trial.

> As we have already pointed out, however, the language of the statute is mandatory and it is addressed to the District Judge. United States v. Vasilick, supra.
>
> Further, whatever logical force the waiver argument might have otherwise, we believe it is completely negated by the fact that this statute originally required one of the parties to move for disqualification (see 28 U.S.C. 24 (1946)), but in 1948 Congress amended the statute, removing this feature entirely. Judicial Code 455, 28 U.S.C. 455 (1964).
>
> As the statute now stands, the duty to disqualify is placed solely upon the District Judge. Burdensome as this duty may occasionally prove to be (particularly where a District Judge has moved from the prosecutorial to the judicial function) we think the statutory mandate must be observed." F2d at 1134

Those cases which consider the issue of the timeliness of the motion for disqualification are cases in which the grounds for disqualification arise under 455(A). See *Bradly* v. *Milliken* 426 F.Supp. 929 (1977).

Respectfully submitted,

/s/ ROBERT B. THOMPSON

[Affidavit of Service omitted in printing]

(2)

No. 91-1510

Supreme Court, U.S.
FILED
APR 16 1992
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1991

MICHAEL J. SULLIVAN,
*Petitioner,*

v.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
now known as CSX TRANSPORTATION, INC.,
a corporation,
*Respondent.*

## BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

*- AND APPENDICES -*

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

WHETHER PETITIONER'S FAILURE TO PRESENT WITH ACCURACY THE FACTS AS TO WHEN HE FIRST ACKNOWLEDGED THE RELATIONSHIP AT ISSUE CONSTITUTES "A SUFFICIENT REASON FOR DENYING THE PETITION"?

II.

WHETHER THE COURT OF APPEALS CORRECTLY DECIDED THAT THE FACTS FAILED TO DEMONSTRATE THAT THE TRIAL COURT KNEW HER SPOUSE HAD A "FINANCIAL INTEREST" IN THE RESPONDENT OR "ANY OTHER INTEREST THAT COULD BE SUBSTANTIALLY AFFECTED BY THE OUTCOME" OF THE TRIAL AS REQUIRED BY 28 U.S.C. § 455(b)(4)?

A. Whether The Court Of Appeals Correctly Held That An Independent Attorney Is Not A "Director, Adviser Or Other Active Participant In The Affairs Of" Respondent?

B. Whether The Court Of Appeals Correctly Ruled That The Trial Court's Spouse Did Not Have An Interest In The Respondent That Could Be "Substantially Affected By The Outcome" Of The Trial?

III.

WHETHER THIS COURT SHOULD DECLINE TO REVIEW THE DECISION OF THE COURT OF APPEALS THAT PETITIONER HAD THE BURDEN ON APPEAL OF PROVING THAT BASED ON FACTS IN THE RECORD THE TRIAL COURT ABUSED ITS DISCRETION IN NOT REMANDING FOR FURTHER PROCEEDINGS?

A. Whether The Court Of Appeals Correctly Used The Abuse Of Discretion Standard In Reviewing The Trial Court's Denial Of Petitioner's Recusal Motion Made Eight Months After Petitioner Acknowledged The Relationship At Issue?

B. Whether This Court Should Decline To Review The Court Of Appeals' Denial Of Petitioner's

Motion For Rehearing Requesting — For The First Time — That The Case Be Remanded For A Hearing To Determine To What Extent The Trial Court's Spouse Represented The Respondent As An Attorney In Totally Unrelated Matters When Petitioner Acknowledged That He Was Aware Of Such Representation And Had No Objections Eight Months Before Trial?

IV.

WHETHER THE FAILURE OF PETITIONER — EVEN ASSUMING A VIOLATION OF 28 U.S.C. 455(a) OR (b)(4) — TO RAISE THE CONFLICT ISSUE FOR EIGHT MONTHS AFTER HE FIRST ACKNOWLEDGED IT AND THEN ONLY AFTER A TRIAL BY JURY WHICH RETURNED A VERDICT DISSATISFACTORY TO PETITIONER CONSTITUTES "A SUFFICIENT REASON FOR DENYING THE PETITION" AS WELL AS JUSTIFIES LETTING STAND THE TRIAL COURT'S DECISION DENYING PETITIONER'S MOTION TO VACATE JUDGMENT AND FOR A NEW TRIAL?

## LIST OF PARTIES

The parties to the proceedings below were the petitioner, Michael J. Sullivan, and the respondent, Chesapeake and Ohio Railway Company, now known as CSX Transportation, Inc.

## LIST OF PARENT COMPANIES AND NON WHOLLY OWNED SUBSIDIARIES

CSX Transportation, Inc. has a parent: CSX Corporation. Its non wholly owned subsidiaries are:

Allegheny and Western Railway Company
The Baltimore and Cumberland Valley Rail Road Extension Company
The Central Railroad Company of South Carolina
The Cincinnati Inter-Terminal Railroad Company
The Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
The Home Avenue Railroad Company

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No. 91-1510

In The

# Supreme Court of the United States

October Term, 1991

MICHAEL J. SULLIVAN,

*Petitioner,*

v.

CHESAPEAKE AND OHIO RAILWAY COMPANY, now known as CSX TRANSPORTATION, INC., a corporation,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The respondent Chesapeake & Ohio Railway Company, now known as CSX Transportation, Inc. ("CSX"), respectfully requests that this Court deny the Petition for Writ of Certiorari ("petition"), seeking review of the Opinion ("opinion") and the Order Denying Petition for Rehearing ("order") of the Sixth Circuit Court of Appeals in this case. The opinion, filed October 25, 1991, and order, filed December 19, 1991, are attached as Appendix A and B, respectively, to the petition.

### STATUTE INVOLVED

28 U.S.C. § 455, entitled "Disqualification of justice, judge or magistrate", is reproduced herein in its entirety as Appendix F (p. F-1).

### COUNTERSTATEMENT OF THE CASE

#### *SUMMARY OF FACTS*

Petitioner claimed at trial and on appeal that he suffered a permanently disabling knee injury as a result of

an accident he sustained at work on May 13, 1987 when he attempted to open a knuckle on one of defendant's railcars.[1]

At trial, respondent presented evidence that the accident was unwitnesses (I TR 168)*, that the accident could not have occurred as plaintiff claimed or that, if it did, petitioner violated two safety rules in attempting to open the knuckle.

As to damages, respondent presented evidence which cast doubt on petitioner's credibility as to causation, past and future wage loss and the severity of the injury. Petitioner testified on direct that he could not return to work because when he did, his knee swelled up. He gave as an example the "very bad" swelling which occurred when he returned to work on May 18, 1988 (I TR 32). Respondent's expert, Dr. Wolf, testified that if the knee did swell as a result of work it would be a disability (Dep. of Dr. Wolf on July 14, 1989, pp. 18-20). To contradict petitioner's direct testimony as to his "very bad" swelling on May 18, 1988, respondent called as a rebuttal witness Dr. Cahoon who testified that she examined petitioner on the evening of May 18, 1988 and found no swelling, his reports to her of swelling to the contrary (III TR 122-124).

In closing, petitioner requested a verdict of $872,000.00.

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[1] **Petitioner states in the Summary of Facts in his petition that ". . . the knuckle component of the coupler fell out . . ." (p. 3, petition). This is the first time plaintiff made this allegation. In his Brief and Argument in the Court of Appeals, petitioner stated: "The knuckle did not fall out . . ." (p. 4, Brief and Argument of Plaintiff-Appellant.)**

* **The reference "___ TR ___" in this Brief is to the trial transcript.**

The jury returned a verdict in the amount of $40,000.00, on which the trial court entered judgment. It denied the parties' post-trial motions.

***HISTORY OF THE DISQUALIFICATION ISSUE***

Petitioner's representations to this Court in his petition on this issue are inaccurate. These inaccurate representations warrant summary denial of his petition. At the least, they require respondent to provide the following, more accurate, recitation of the history of this issue.

On March 29, 1988, the trial court issued a Scheduling Order in this matter (R-13)* (Appendix E hereto). It provided that counsel prepare and submit a joint final pretrial order on November 8, 1988 and appear for a final pretrial conference on November 15, 1988 (¶¶ 5 and 6 of the Scheduling Order, p. E-1).

On that date, November 15, 1988, counsel appeared before the trial court. Laurence C. Acker appeared on behalf of the plaintiff; Mary C. O'Donnell appeared on behalf of defendant. Counsel proferred to the court their Final Pre-Trial Order ("joint final pretrial order") (R-90) (Appendix D hereto). It contained, *inter alia*, several hand-written notations on pages 6 and 12 and a hand-written stipulation on a yellow piece of thirteen-inch legal paper entitled "Appendix".[2] Although the docket shows that the trial court did not *enter* the joint final pretrial order until July 25, 1989, petitioner has

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* **The reference "R___" in this Brief is to the record or docket sheet, Appendix B hereto.**

[2] **The notations and strike marks on pages 3-4 of the joint final pretrial order relative to Count II appear on the original court document and would appear to have been made either by or at the direction of the trial court. These state: "plaintiff has dropped this count" to reflect plaintiff's dismissal of Count II prior to or during trial.**

never disputed that counsel *submitted* on November 14, 1988 the joint final pretrial order with its hand-written notations on pages 6 and 12 and its hand-written Appendix.

In fact, on February 6, 1989, petitioner filed a Motion to Amend the Final Pretrial Order to add an expert witness (R-73) (Appendix C hereto) (without exhibits). Although the motion itself is undated, the proof of service is dated February 3, 1989 and the docket sheet reflects a filing date of February 6, 1989. The Motion provides:

> Now comes the plaintiff, MICHAEL J. SULLIVAN, by his attorneys and moves the Honorable Court to grant him leave to amend the pretrial order by adding the name of Dr. Arnold Eisenman. In support of this motion plaintiff states as follows:
>
> 1. Subsequent to the submission *and entering of the pretrial order* plaintiff was examined by Dr. Arnold Eisenman at the request of plaintiff's counsel. A copy of Dr. Eisenman's report concerning his examination of November 17, 1988 is attached as Exhibit A.

(No pagination: first page, p. C-1 *infra*) (emphasis added). This motion clearly reveals petitioner's counsel's belief that the joint final pretrial order proferred on November 15, 1988 had been entered by the court prior to the examination by Dr. Eisenman on November 17, 1988.

It is equally clear that the joint final pretrial order proferred by counsel on November 15, 1988 — eight months before commencement of trial on July 24, 1989 (R-89) — contained the stipulation regarding the disqualification issue. Petitioner has never presented — to any court at any level — a joint final pretrial order which does *not* contain the subject hand-written stipulation.

On the second day of trial, July 25, 1989, Judge Hackett's clerk approached trial counsel and requested that each initial the hand-written Stipulation of Facts written on a piece of thirteen-inch yellow legal paper entitled "Appendix" to the joint final pretrial order. Each did so. The initials "RBT" and "GSD" correspond to Robert B. Thompson, trial counsel for plaintiff (and counsel of record for petitioner herein), and Gene S. Davis, trial counsel for defendant (and counsel of record for respondent herein). Mr. Thomas does not deny that his partner is Laurence C. Acker, who appeared at the final pretrial conference, who signed the joint final pretrial order and whose hand-written notations appear on pages 6 and 12 of the final pretrial order.[3]

On July 28, 1989, the jury returned a verdict in the amount of $40,000.00 upon which the trial court entered judgment on July 31, 1989 (R-98).

On August 8, 1989, petitioner filed a Motion for New Trial on the Issue of Damages only (R-101).

Simultaneously therewith, almost nine months after he acknowledged the existence of the subject relationship and only after receiving a verdict $832,000.00 less than he requested, petitioner filed a Motion to Vacate Judgment and All Proceedings Due to the Trial Court's Failure to Disqualify Itself (R-102).

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[3] **There is no dispute that Mary C. O'Donnell, partner of Mr. Davis who appeared at the final pretrial conference and who signed and submitted the joint final pretrial order on November 15, 1988, authored and hand-wrote the requisite number of copies of the stipulation contained in the Appendix to the joint final pretrial order.**

## REASONS FOR DENYING PETITION FOR CERTIORARI

### I.

### PETITIONER'S FAILURE TO PRESENT WITH ACCURACY THE FACTS AS TO WHEN HE FIRST ACKNOWLEDGED THE RELATIONSHIP AT ISSUE CONSTITUTES "A SUFFICIENT REASON FOR DENYING THE PETITION."

Rule 14.5 of the Supreme Court Rules provides:

> The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient basis for denying the petition.

Underlying the rules pertaining to jurisdiction on writ of certiorari is the rule and policy of this Court that: "A review on writ of certiorari is not a matter of right, but of judicial discretion." (Sup. Ct. R. 10).

This Court ". . . relies heavily upon the good faith of the petitioner's counsel in accurately stating or summarizing the pertinent facts . . ." Robert L. Stern, Eugene Gressman, & Steven M. Shapiro, *Supreme Court Practice*, p. 371 (6th ed. 1986).

The Statement of the Case ". . . is the place for accurately summarizing the relevant facts . . ." *Id.* at 372. Also, "[t]he unfavorable facts . . . must be given whenever necessary to a proper and full understanding of the case by the court . . ." *Id.*

Contrary to and despite the admonition of Rule 14.5 and the affirmation made by all counsel before this Court required by Rule 5.4 of the Supreme Court Rules, petitioner misrepresents the facts relative to the history of the disqualification issue. Specifically, petitioner misrepresents when, in what manner and at whose initiation he acknowledged the relationship at issue.

The first misrepresentation occurs on page 4 of the petition in which petitioner states:

> At the time of the Final Pretrial Hearing on November 15, 1988, defendant's counsel *told* Petitioner's counsel outside the presence of the trial judge, that Judge Hackett's husband had occasionally represented the CSX in FELA cases. The relationship was never disclosed by the trial judge, nor ever discussed in the trial judge's presence.
>
> On the second day of trial in July 1989, the trial Court's clerk approached trial counsel during a recess and presented them with a handwritten stipulation on yellow legal pad which stated "Petitioner (sic) is aware that Judge Hackett's husband is an attorney who represents CSX Transportation and he waives any objections to her presiding over this case." and asked the Petitioner's counsel to initial it.
>
> Petitioner's counsel initialed it and *thereafter it became part of the Final Pretrial Order.*

(Petition for Writ of Certiorari, p. 4) (emphasis added).

The first misrepresentation, that ". . . defendant's counsel *told* petitioner's counsel . . ." (emphasis added) implies that respondent's counsel gave petitioner's counsel oral notice only. Such is clearly not the case. As discussed above, in *STATEMENT OF THE CASE, History of the Disqualification Issue*, petitioner's counsel signed and proferred to the court the joint final pretrial order containing the *written* stipulation that petitioner's counsel knew about and did not object to the subject trial court presiding over the trial. This signing and submission of the *written* stipulation by petitioner's counsel occurred eight months *before* the commencement of trial. Thus, contrary to his implication, petitioner was

apprised — in *writing* — of the subject relationship eight months prior to trial.

The second misrepresentation on page 4, that "on the second day of trial . . ., the . . . Court's clerk approached counsel . . . and presented them with a handwritten stipulation on yellow legal pad . . ." implies that this was the first time petitioner counsel saw the subject stipulation. This is simply not true. Leaving aside the incorrect statement that the subject stipulation was ". . . on yellow legal pad . . ." (since the record clearly shows it was on a single piece of paper appended to the joint final pretrial order), petitioner does not deny that counsel for petitioner who appeared, signed and submitted the joint final pretrial order containing the handwritten stipulation at the final pretrial conference on November 15, 1988 is the *partner* of petitioner counsel and who was authorized to sign documents on behalf of and bind trial, now petitioner, counsel.

The third misrepresentation, again on page 4, that after counsel initialed the stipulation ". . . *thereafter it became part of the Final Pretrial Order*" (emphasis added) is an outright misstatement. As noted above, the stipulation became part of the joint final pretrial order on November 15, 1988 — *not* eight months later, on the second day of trial. This brazen misstatement shows not only disrespect for this Honorable Court, to which petitioner has come for extraordinary relief, it also shows the desperation of a counsel who knows he has no legal basis, whatsoever, for either his underlying claim or his petition.

Moreover, the bold misstatement is made quite late as it is made for the first time before this Court. Nowhere in his post-trial motions or in his brief on appeal does petitioner make this claim.

In a fourth, and perhaps even more egregious, misstatement on page 14, petitioner inaccurately attributes

the etymology of the stipulation to the trial court when he states: ". . . in the case at bar, the United States District Court Judge *sought* and accepted an alleged waiver . . ." (emphasis added). The truth is that counsel for respondent initiated and authored the stipulation and submitted it at the final pretrial conference to counsel for petitioner for his approval and inclusion in the joint final pretrial order. Counsel did so to remove any doubt that petitioner knew about the subject relationship, to allay her own concern that petitioner might do exactly what he is trying to do here (i.e., get a "second bite" at the trial apple) and to "flush out" any objection of petitioner. Thus, counsel — *not* the court — sought the stipulation. Any blame or responsibility must be placed where it belongs, at the feet of respondent's counsel. Petitioner cannot save his weak argument of trial court bias by falsely attributing the stipulation to the court.

Like the "thereafter it became part of the record" misstatement, the false attribution is made for the first time before this Court.

Petitioner's resort to outright inaccuracies and misstatements on essential facts directly pertaining to the very issue upon which he seeks certiorari should preclude granting certiorari.

## II.

**THE COURT OF APPEALS CORRECTLY DECIDED THAT THE FACTS FAILED TO DEMONSTRATE THAT THE TRIAL COURT KNEW HER SPOUSE HAD A "FINANCIAL INTEREST" IN THE RESPONDENT OR "ANY OTHER INTEREST THAT COULD BE SUBSTANTIALLY AFFECTED BY THE OUTCOME" OF THE TRIAL AS REQUIRED BY 28 U.S.C. § 455(b)(4).**

28 U.S.C. § 455 contains numerous sections that have not been set forth in petitioner's brief. The entire

statute is set forth in respondent's appendix (Appendix F). Subsection (a) provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a).

The statute, in subsection (e), permits a waiver of the grounds for disqualification under subsection (a) but not under subsection (b). Subsection (e) provides:

> No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

In the present case, the trial court did not hold a hearing in which it made a full disclosure on the record and sought a waiver. The petitioner, however, does not claim a violation of 28 U.S.C. § 455(a). Therefore, the trial court's failure to conduct a hearing and to obtain a waiver by petitioner is irrelevant.

Respondent does not claim that the stipulation in the joint final pretrial order satisfies the hearing requirement contemplated by section 455(e) or that, if there is a ground for disqualification under section 455(b), it can be waived. Rather, the significance of the stipulation — an attempt by the parties eight months before trial to waive in writing any objections to the trial court hearing the case — relates only to what remedy, if any, is available to petitioner if a violation of section 455(b) is found. This issue is addressed in section IV of this brief.

The only facts with which the Court of Appeals had to work in resolving the issue whether the trial court violated section 455(b) were those contained in the record on appeal. The record on appeal on the recusal issue consisted of only: the written stipulation attached to the final pretrial order (Appendix D hereto); the parties' post-trial pleadings; and the trial court's Order Denying Motion to Vacate Judgment (Petitioner's Appendix C).

The Court of Appeals could glean from these documents only the following limited information on this issue:

(1) That the trial court's spouse is an attorney;

(2) That he represents CSX "in specific cases and matters"; and

(3) That he and their daughter represented CSX in a case before the Sixth Circuit involving toilet seats on locomotives, *CSXT, Inc.* v. *Pitz, Director of Dep't of Transp. of the State of Michigan,* 833 F.2d 468 (1989), *cert. denied,* 110 S.Ct. 1480 (1990).

Petitioner claims that, based on these facts, the Court of Appeals should have found that the trial court violated section 455(b) by not immediately disqualifying itself from the case. These facts, however, are insufficient proof of a section 455(b) violation. Thus, petitioner failed to meet his burden of proving to the Court of Appeals that the trial court abused its discretion in denying his motion to vacate judgment.

### A. The Court Of Appeals Correctly Held That An Independent Attorney Is Not A "Director, Adviser Or Other Active Participant In The Affairs Of" Respondent.

Petitioner misinterprets the Court of Appeals' decision by implying that the *extent* of representation by

the trial judge's spouse in other matters was relevant to its decision that he was not an adviser. It was not. Petitioner claimed that the trial judge's spouse had a "financial interest" in defendant because he was an "adviser". "Financial interest" is defined as follows:

> "financial interest" means ownership of a legal or equitable interest, *however small*, or a relationship as director, *adviser*, or other active participant in the affairs of a party. . .

28 U.S.C. § 455(d)(4) (emphasis added).

If the legislature intended the term "adviser" to include "lawyer", then the number of cases — whether one or one hundred — in which the spouse represented a party would be immaterial. It had no such intention, however, as it specifically refers to and employs the precise term "lawyer" in another section of the statute. Subsection (b) specifically requires recusal when a judge's spouse is acting as a lawyer in the proceeding before the court:

> (b) He shall also disqualify himself in the following circumstances. . .
>
> * * *
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> * * *
>
> (ii) Is acting as a lawyer in the proceeding;

28 U.S.C. § 455(b)(5)(ii).

Thus, the Court of Appeals' decision that "adviser" does not include "lawyer" as the statute otherwise

covers the latter (Opinion, pp. 11-12; Petitioner's Appendix A) is consistent with the plain language of the statute.

It is also consistent with the intent of the statute as petitioner's argument that "adviser" includes "lawyer" would require a federal judge to disqualify himself in *any* case where his spouse was acting as an attorney for one of the parties in *any* type of matter. For example, if the subject spouse of the subject trial court represented respondent in even the most minor of matters in Ohio, the court would have to disqualify itself in a case in Michigan. Such an extreme result was not contemplated by the legislature.

### B. The Court Of Appeals Correctly Ruled That The Trial Court's Spouse Did Not Have An Interest In The Respondent That Could Be "Substantially Affected By The Outcome" Of The Trial.

The portion of the statute dealing with financial interest also makes reference to ". . . any other interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4) provides:

> (b) He shall also disqualify himself in the following circumstances:
>
> * * *
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in party to the proceeding, *or any other interest that could be substantially affected by the outcome of the proceeding.*

28 U.S.C. § 455(b)(4) (emphasis added).

The Court of Appeals considered the argument by petitioner, similar to arguments rejected by other courts, that the respondent was such a substantial client of the judge's spouse, that a large verdict might cause respondent to discharge him as its attorney in other matters. The Court reasoned:

> Sullivan contends that the trial judge has a financial interest in this case due to her husband's prior representation of CSX in other matters, her daughter's representation of CSX on at least one occasion, and her prior affiliation with her husband's firm. To meet the burden of showing financial interest, a movant must do more than allege that "law firms are interested in as many clients as they can get, that [the judge's husband's firm] would like to keep the defendant as a client, and that if the defendant loses this lawsuit, it will take its legal business elsewhere." *Diversifoods, Inc.* v. *Diversidoods, Inc.*, 595 F. Supp. 133, 139 (N.D. Ill. 1984); *see also Chitimacha*, 690 F.2d at 1166-67. It is conceivable that a showing could be made, in a proper case, that a court's spouse may have such a *material* relationship to a client *that it may be said that a financial interest exists.*

(Opinion, p. 9; Petitioner's Appendix A) (emphasis added).

However, as the Court of Appeals held, petitioner had not made a sufficient showing in this case. The facts in the record did not go beyond what the trial judge indicated in its order denying petitioner's motion to vacate, which provided:

> This section simply is not applicable to the trial judge in this case. Her spouse has no financial

> interest in the subject matter in controversy or any party to the proceedings, or any other interest that could be substantially affected by the outcome of the proceeding. *The judge's spouse, an attorney, is at times retained by the defendant to represent it in specific cases and matters as are other attorneys in the legal community. He is not in-house counsel nor is he paid a retainer. He has not participated in this matter in any way.* Neither this judge nor her spouse will benefit from the outcome in this case. The judge's spouse has no role in this matter and this fact was known to plaintiff's counsel in advance of trial as evidenced by the stipulation attached to the final pretrial order. Counsel had no concern at the time and need have none now.

(Order Denying Motion to Vacate, pp. 18-19; Petitioner's Appendix C) (emphasis added).

No facts were presented by petitioner at any time which dispute the facts disclosed in the trial court's order. Based on the facts before it, the Court of Appeals could not have found that the trial judge abused its discretion by not disqualifying itself because of a violation of section 455(b)(4).

## III.

## THIS COURT SHOULD DECLINE TO REVIEW THE DECISION OF THE COURT OF APPEALS THAT PETITIONER HAD THE BURDEN ON APPEAL OF PROVING BASED ON FACTS IN THE RECORD THAT THE TRIAL COURT ABUSED ITS DISCRETION IN NOT REMANDING FOR FURTHER PROCEEDINGS.

The Court of Appeals did not hold, as petitioner argues, that he has to request an evidentiary hearing before the trial judge is required to disqualify itself

under section 455(b). The statute clearly requires the trial judge to disqualify itself when the grounds listed in this section exist. However, on appeal petitioner *did* have the burden of proving that the trial court abused its discretion in concluding that no violation occurred and that petitioner's Motion to Vacate was not timely.

### A. The Court Of Appeals Correctly Used The Abuse Of Discretion Standard When Reviewing The Trial Court's Denial Of Petitioner's Recusal Motion Made Eight Months After Petitioner Acknowledged The Relationship At Issue.

The Court of Appeals held that in order to reverse the trial court's recusal decision, it had to find an abuse of discretion:

> A recusal motion is committed to the sound discretion of the district court. On appeal, we ask only *whether the court abused its discretion.*

(Opinion, p. 9; Petitioner's Appendix A, p. 8) (citations omitted) (emphasis added).

Its decision is totally consistent with decisions of other courts and the intent of the legislature as reflected in the legislative history:

> Finally, while the proposed legislation would adopt an objective test, *it is not designed to alter the standard of appellate review on disqualification issues.* The issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the *failure to disqualify was an abuse of sound judicial discretion.*

H.R. Rep. No. 1453, 93rd Cong., 2d. Sess. (1974); 3 U.S. Cong. & Admin. News 6355 (1974) (emphasis added). Petitioner wholly fails to argue, let alone to demon-

strate, that the opinion of the Court of Appeals is inconsistent with the legislative history and intent.

**B. This Court Should Decline To Review The Court Of Appeals' Denial Of Petitioner's Motion For Rehearing Requesting — For The First Time — That The Case Be Remanded For A Hearing To Determine To What Extent The Trial Court's Spouse Represented The Respondent As An Attorney In Totally Unrelated Matters When Petitioner Acknowledged That He Was Aware Of Such Representation And Had No Objections Eight Months Before Trial.**

In its opinion, the Court of Appeals did not place the burden of requesting an evidentiary hearing at the trial level on petitioner. Rather, it suggested that such a method *may have been utilized* by a party to "flush out" the facts pertaining to financial interest.

Petitioner, however, never requested an evidentiary hearing at the trial level or in his intitial appeal. Rather, his position has been that the status of the judge's spouse as an attorney for CSX in any other matters constituted a financial interest. Only after the Court of Appeals affirmed the trial court did petitioner request, for the first time, an evidentiary hearing in his Petition for Rehearing in the Court of Appeals. (Appendix A hereto).

Federal Rule of Appellate Procedure 40 governs motions for rehearing. It permits a motion for rehearing on points of law or fact the petitioner claims the Court of Appeals overlooked or misstated. Petitioner's request for an evidentiary hearing was never raised in his initial appeal; therefore, it could not be considered in a petition for rehearing.

This Court should not grand certiorari on an issue petitioner failed to raise for three years. The jury in this

case simply did not believe petitioner's testimony. The trial judge conducted a fair trial, ruling at times for petitioner and at times for respondent. These rulings were the subject of appeals by both parties. The Court of Appeals reviewed the court's rulings as to both parties and affirmed. At this point, this litigation should end.

## IV.

**THE FAILURE OF PETITIONER — EVEN ASSUMING A VIOLATION OF 28 U.S.C. § 455 (a) OR (b) (4) — TO RAISE THE CONFLICT ISSUE FOR EIGHT MONTHS AFTER HE FIRST ACKNOWLEDGED IT AND THEN ONLY AFTER A TRIAL BY JURY WHICH RETURNED A VERDICT DISSATISFACTORY TO PETITIONER CONSTITUTES "A SUFFICIENT REASON FOR DENYING THE PETITION" AS WELL AS JUSTIFIES LETTING STAND THE TRIAL COURT'S DECISION DENYING PETITIONER'S MOTION TO VACATE JUDGMENT AND FOR A NEW TRIAL.**

Eight months prior to trial petitioner knew that the trial court's spouse represented CSX in other matters. At that time, petitioner stipulated in writing that he had no objection to the court presiding over the trial. While counsel for petitioner states that he did not know about the federal recusal statute until after trial, he *did* know about the relationship which he belatedly and now puts at issue. It was only after a full trial at taxpayer expense and a verdict dissatisfactory to him that petitioner complained about the trial court. Such a gambit — even assuming a violation of 28 U.S.C. § 455 (which respondent denies) — constitutes a sufficient reason for denying the petition.

Furthermore, petitioner's strategy of waiting over eight months to complain and then proceeding through trial in the hope of a favorable outcome justifies — even assuming a violation (which respondent denies) — let-

ting stand the trial court's denial of petitioner's motion to vacate and request for new trial.

28 U.S.C. § 455 provides no remedies for its violation. In *Liljeberg* v. *Health Services Corp.*, 486 U.S. 847, 863 (1988), this Court provided guidance on the remedy available for violations of section 455:

> Section 455 does not, on its own, authorize the reopening of closed litigation. However, as respondent and the Court of Appeals recognized, Federal Rule of Civil Procedure 60(b) provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment. In particular, Rule 60(b)(6), upon which respondent relies, grants federal courts broad authority to relieve a party from a final judgment 'upon such terms as are just', provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5). The rule does not particularize the factors that justify relief, but we have previously noted that it provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice,' *Klapprott* v. *United States*, 335 U.S. 601, 614-615, 93 L.Ed. 266, 69 S. Ct. 384 (1949), while also cautioning that it should only be applied in "extraordinary circumstances," *Ackermann* v. *United States*, 340 U.S. 193, 95 L.Ed. 207, 71 S.Ct. 209 (1950). Rule 60(b)(6) relief is accordingly neither categorically available nor categorically unavailable for all § 455(a) violations. We conclude that in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the partic-

> ular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In Re Murchison,* 349 U.S. 133, 136, 99 L.Ed. 942, 75 S.Ct. 623 (1955) (citation omitted).

*Liljeberg,* at pp. 874-875.

Although the present case does not raise a question under subsection (a) of section 455, this Court's analysis provides guidance as to a remedy for a violation of subsection (b). This Court ruled that Federal Rule of Civil Procedure 60(b)(6) may provide recourse but only: upon "just terms"; if the motion is made timely; and if not based on (b)(1)-(5). Respondent submits that these factors dictate that this Court deny the petition for certiorari requesting review of the trial court's denial of the motion to vacate and for new trial.

The factors of "just terms" and timeliness mandate denial where petitioner waited over eight months and put the taxpayers and respondent to the great expense of a trial before he raised the recusal issue. The former also mandates denial where petitioner misstates essential facts relative to the recusal issue.

Further, to the extent that petitioner claims (inaccurately, at least as to the nature of the relationship) that he did not know about either the statute or the nature of the relationship until after trial, he is premising his request for new trial on grounds enumerated in clauses (b)(1) and (2) of Rule 60. This, according to this Court in *Liljeberg,* petitioner cannot do. Thus, the petition with its request for a new trial must be denied.

Even if petitioner *were* able to get past the hurdles of Rule 60(b)(1) and (2), he cannot satisfy the requirement of Rule 60(b)(6) as interpreted by this Court. Petitioner can not show that a new trial would accomplish justice (*Klapprott, supra*); or that this case, with its facts relative to the stipulation, raises "extraordinary circumstances," (*Ackermann, supra*). Nor would denying certiorari and letting stand the denial of the motion to vacate and for new trial: present any risk of injustice to the particular parties or in other cases; present any risk of undermining public confidence in the judiciary; or compromise the desire to "satisfy the appearance of justice." (*In Re Murchison, supra*).

There is no risk to the parties or to other cases where the facts of this case show, to these parties and to others, that those who are forthright with the court ultimately benefit from that characteristic and those who are not suffer the consequences of their chicanery. For this same reason there is no risk of undermining public confidence or of compromising the appearance of justice.

## CONCLUSION

WHEREFORE, respondent herein CSX Transportation, Inc., by and through its attorneys Gene S. Davis and Mary C. O'Donnell, respectfully prays that this Honorable Court deny petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, together with costs and attorneys fees.

Respectfully submitted,

By: /s/ GENE S. DAVIS
*Counsel of Record*
/s/ MARY C. O'DONNELL
*Attorneys for Respondent*

DRIGGERS, SCHULTZ, HERBST & PATERSON
2600 West Big Beaver Road, Suite 550
Troy, Michigan 48084
(313) 649-6000

Dated: April 16, 1992

# APPENDICES TO BRIEF IN OPPOSITION

• • •

## APPENDIX A

### PETITION FOR REHEARING
### AND SUGGESTION FOR REHEARING IN BANC

(United States Court of Appeals — Sixth Circuit)

(Filed November 12, 1991)

(MICHAEL J. SULLIVAN, Plaintiff-Appellant, vs. CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation, Defendant-Appellee — Nos. 90-1136 & 90-1412; Appeal from the United States District Court for the Eastern District of Michigan, Southern Division, No. 87-CV-74410, The Honorable Barbara K. Hackett, Judge Presiding)

* * *

*INTRODUCTION*

This is a Petition for Rehearing on this Court's decision affirming the Judgment below dated October 25, 1991 pursuant to Rule of Appellate Procedure 40. Pursuant to Rule of Appellate Procedure 35(b), Plaintiff also suggests Rehearing In Banc on the issue of the trial court's recusal due to a "financial interest" as defined in 28 U.S.C., Sect. 455(b)4.

*I*

THIS COURT MISAPPLIED THE LAW APPLICABLE TO "FINANCIAL INTEREST" AND INCORRECTLY AND UNFAIRLY AFFIRMED THE JUDGMENT BELOW.

This Court's opinion as it relates to the trial court's "financial interest" is incorrect.

Section 455(B)4 plainly states Judge Hackett must disqualify herself if the judge *or* her spouse "has a financial interest in the subject matter in controversy *or* in a party to the proceeding . . ."

This simply means — without any ambiguity — that if the Judge's husband has a "financial interest" in the "party", CSX, the Judge must disqualify herself.

Judge Hackett's husband at all times that this matter stood before the trial court was receiving legal fees from a party in the proceeding — CSX. This is a direct payment: CSX is paying legal fees to the Judge's husband at the same time the trial judge is making discretionary rulings in Sullivan vs. CSX which can benefit the CSX.

This Court acknowledges at page 11 of its opinion that Mr. Hackett represents CSX in "major litigation at the time." When Mr. Hackett represents CSX in this major litigation is he not an "adviser" to the CSX or "an active participant in the affairs" of CSX? Mr. Hackett actively participated in affairs of CSX and was compensated for it. It is a matter of Record that Mr. Hackett *actively* represented CSX in this Court. This activity fits the definition of "financial intent."

The United States Supreme Court in *Lilgeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194 at 2202 stated:

> "Most importantly, § 455(b)(4) requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety. See § 455(d)(4); *In re Cement and Concrete Litigation*, 515 F.Supp. 1076 (Ariz. 1981), mandamus denied, 688 F.2d 1297 (CA 9 1982), aff'd by the absence of quorum, 459 U.S. 1191, 103 S.Ct. 1173, 75 L.Ed.2d 425 (1983).

This Court's opinion incorrectly requires a "material financial interest." (Opinion pg. 11) How much does Mr. Hackett have to be paid by CSX before it is "material"? Section 455(B)(4) and the United States Supreme Court require recusal regardless of how substantial or insubstantial the financial interest.

This Court's conclusion at page 19 highlights this misapplication of the law when it states the trial court "did not abuse its discretion in refusing to vacate the judgment". While the Court's "discretion" may have some bearing on Section 455(a) issues;

> "The purpose of (b) is to establish an absolute prohibition against a judge's knowingly presiding in a case in which he has a financial interest, either in his own or a spouse's (or minor child's) name. Before the statute was passed judges did not recuse themselves in such cases unless the interest was so large that a reasonable person might think it could influence the judge's decision. This standard was too nebulous — not least from the judge's standpoint — and Congress replaced it by a flat prohibition. Although the prohibition results in recusal in cases where the interest is too small to sway even the most mercenary judge, occasional silly results may be an acceptable price to pay for a rule that both is straightforward in application and spares the judge from having to make decisions under an uncertain standard apt to be misunderstood. See H.R. Rep. No. 1453, 93d Cong., 2d Sess. 2 (1974)." *Union Carbide* v. *U.S. Cutting Serv. Inc.*, 782 F2d 710 at 714 (1986).

The Court's conclusion that "adviser" does not apply to lawyers is also erroneous. Section 455(B)(5)(ii) relates to attorneys involved in the proceedings

whereas Section 455(B)(4) deals with relationships between the trial judge, her spouse and the party. For instance, according to this opinion if Judge Hackett's husband was an outside certified public accountant or outside management consultant for the CSX then he could be an "adviser" or "active participant", but because he is a lawyer subject to Section 455(B)(5), he isn't covered by these categories. This is illogical.

Thic Court's opinion further misapprehends the law because it encourages minimal disclosure from trial courts and then leaves it up to one of the parties to dig out the true facts. No case supports this Court's view that plaintiff has a burden to prove a Section 455(B)(4) financial interest with an evidentiary hearing. The Trial Court has a duty to make full disclosure.

In this case where there is a claimed financial interest between a judge's spouse and a party, only one person will *not know all* the facts — the plaintiff, Michael Sullivan. The Trial Court[1] and the CSX know precisely how much money was being paid from CSX to the spouse, how many cases were assigned, what advice was given and the extent of the spouse's active participation in the affairs of CSX. Yet this Court now says plaintiff must insist on some form of evidentiary hearing to prove what the Trial Court and CSX already *know* — the extent of the trial court's spouse's relationship.

The purpose of Section 455 and the integrity of the entire judiciary is undermined by this decision. Full disclosure of the relationship *by the participants* in the relationship is the straightforward and fair manner.

Plaintiff knows of no procedure for conducting evidentiary hearings into the financial and professional

---

[1] **Section 455(C) requires the trial court to inform herself of her spouse's financial interest.**

relationships of this Judge's spouse and a party. The issue of this Trial Court's financial interest is not supposed to be adversarial. The Trial Court and the CSX should be required to fully disclose this relationship — a relationship this Court admits could amount to a "financial interest".

The Trial Court's own order denying the Motion to Vacate says little about the actual relationship of her husband to CSX. It certainly does not acknowledge that her husband is representing CSX in major litigation as this Court's opinion now does. It does not deny that Mr. Hackett "advises" the CSX on legal matters, or that Mr. Hackett actively participates in the legal affairs of this party. CSX, of course, claims not to know anything except generalities based upon information and belief.

This Court should, at a minimum, if it cannot make a determination on the Record before it:

a) remand for a hearing on the issue of "financial interest" between the Trial Court's spouse and CSX, or

b) order the CSX to supplement the Record to produce:

   1) All CSX checks made payable to Patrick Hackett and/or Frasco Hackett and Mills from 1987 to 1991;

   2) All legal bills and invoices submitted by Patrick Hackett and/or Frasco, Hackett & Mills from 1987 to 1990;

   3) A list of all CSX cases assigned or pending to Patrick Hackett or Frasco, Hackett & Mills from 1987 to 1990.

The history of the *Lilgeberg*, *supra*, litigation is instructive and supports petitioner's alternative

requests. In *Lilgeberg*, the trial court denied the original motion to vacate the judgment. The Fifth Circuit, in an unpublished opinion, remanded for an evidentiary determination of additional facts deemed relevant to recusal, 747 F2d 1463 (1984). The second opinion of the Fifth Circuit, which was published, (796 F2d 796) and which vacated the judgment noted the following rationale for remand in the unpublished opinion:

> "the judiciary must be governed by the appearance as well as the reality of disinterested adjudication", 796 F2d at 799.

Petitioner, a railroad brakeman, is entitled to the *reality* of disinterested adjudication. A remand for evidentiary hearing serves justice and that purpose. CSX can also be ordered to produce the necessary documentation directly in this court without the necessity of holding a hearing at the trial court level.

Due to the importance of the Section 455(b) claim and because the trial court's spouse was an attorney for the party defendant, pursuant to Rule of Appellate Procedure 35(b), plaintiff suggests consideration of Rehearing In Banc for this issue.

*II*

THIS COURT MISAPPLIED THE FACTS TO THE APPLICABLE LAW IN ITS RULING ON THE THREE REMAINING ISSUES RAISED ON APPEAL.

*A.* This Court's Opinion As It Relates To The Trial Court's Refusal To Permit Plaintiff To Call Dr. Eisenman Either In His Case In Chief Or For Rebuttal Is Erroneous.

The Trial Court conferred a distinct advantage to the defendant by permitting it unopposed medical testimony. This opinion mocks the concept that both par-

ties have an equal opportunity to discover their opponent's position. This Court set up a special schedule for the defendant to obtain medical evidence. It is not enough for plaintiff to know that CSX intends to offer expert medical testimony, but rather plaintiff needs to know what that expert testimony will be. The Trial Court's opinion permitted defendant to obtain expert medical testimony and effectively shield it from discovery or opposition. This Court ignores the facts when it indicates that no offer of proof was made regarding the excluded testimony. Plaintiff's Motions before the Trial Court contain specific references to Dr. Eisenman's testimony, a copy of his report, and itemized exactly what Dr. Eisenman would testify to. The Record contains considerable indication of Dr. Eisenman's testimony. More importantly, the Trial Court abused its discretion by ruling Dr. Eisenman was not a necessary rebuttal witness without even knowing what Dr. Wolf would testify to.

Not only do the facts show a clear abuse of discretion, but highlights the need for disinterested adjudication by the trial judge, free of conflicting financial interests.

*B.* This Court's Opinion Misapplies The Facts When It Concedes That Questions Regarding Wages Or Salary From Defendant "Opens The Door" To Collateral Sources.

The opinion fails to recognize what constitutes a "collateral source." Further, the reference to collateral source was brought out by defense counsel in direct violation of the Trial Judge's own directive. Regardless of what defense counsel believed about plaintiff having, "opened the door", CSX was still obliged to revisit this issue first with the trial court. On this basis alone, the

jury's award should have been reversed due to these improper comments.

More importantly, the most glaring error in this Court's reasoning is that it equates funds received from the defendant with collateral sources. For instance, receipt of "salary wages or money from the railroad" does not involve any reference to collateral sources. Simply put, if the railroad paid Mr. Sullivan salary or wages, that is not a collateral source and defendant would be entitled to show that to lessen damages. The opinion says nothing as to how plaintiff is to prove lost wages from his employment without first showing that he received no wages from his employment. Likewise, medical bills paid by insurance generated through the defendant's employment of plaintiff are not collateral sources. They are all simply relevant to what plaintiff has lost as a result of the injury.

A collateral source is the receipt of monetary benefits from a source other than the defendant. For instance here, plaintiff received benefits not from the defendant, but from the Railroad Retirement Board. Those benefits are fully recoverable from any award given to the plaintiff. The issue of collateral sources was never mentioned by plaintiff either directly or "arguably". Accordingly, this Court erred in not granting a new trial based upon the defense counsel's interjection of collateral sources into plaintiff's trial.

*C.* This Court's Opinion Permitting The Submission Of Instruction 85.11 Rather Than 85.12 Was Error.

It is inaccurate to conclude 85.11 and 85.12 are "substantively similar" (Opinion at pg. 18). Instruction 85.11 states the law with respect to present value and then contains an explicit direction to the jury as to how to go about reducing plaintiff's future lost damages to pre-

sent value. Instruction 85.12 also recites the law, but contains no direction to the jury as to how to reduce the future lost wages to present cash value. The reason 85.12 does not contain that direction to the trial jury is precisely because an economist has already made that calculation for the jury. The net effect of giving 85.11 where an economist testifies is either to (a) negate the economist's testimony, or (b) direct the jury to take the figure that has already been reduced to present value and once again reduce it to present value. This is a substantive difference and this Court's conclusion to the contrary is erroneous.

*CONCLUSION*

Plaintiff requests that this Petition for Rehearing be granted and that the Judgment below be reversed and this cause be remanded for a new trial. Alternately, plaintiff requests that this Court:

a) remand this cause to the trial court for a hearing to determine all issues of the amount of sums paid by CSX to the trial judge's spouse and the extent of the advice and active participation of the trial judge's spouse in affairs of CSX as a result of their attorney-client relationship and all other matters relating to the "financial interest" of the trial court's spouse and defendant CSX, or

b) order the CSX to supplement the Record to produce:

   1) All CSX checks made payable to Patrick Hackett and/or Frasco Hackett and Mills from 1987 to 1991;

   2) All legal bills and invoices submitted by Patrick Hackett and/or Frasco, Hackett & Mills from 1987 to 1990;

3) A list of all CSX cases assigned or pending to Patrick Hackett or Frasco, Hackett & Mills from 1987 to 1990.

Respectfully submitted,

/s/ Robert B. Thompson
Attorney for Plaintiff-Appellant

Harrington & Harrington, Ltd.
310 South Michigan Avenue, Suite 1700
Chicago, Illinois 60604

## APPENDIX B

### DOCKET SHEET FROM U.S. DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN – SOUTHERN DIVISION

(Filed July 27, 1990 in the United States Court of Appeals for the Sixth Circuit)

TRANSMISSION FORM

IMPORTANT: IN ALL TRANSMISSIONS, INCLUDE ONE COPY OF YOUR DOCKET SHEET AND TWO COPIES OF THIS COMPLETED FORM.

District Court: *EASTERN DISTRICT OF MICHIGAN*
*SOUTHERN DIVISION AT DETROIT*
District Court No.: *87-74410DT*

CAPTION (Include names of all plaintiffs and defendants who are parties to the appeal. Use separate sheet if necessary): *Michael J. Sullivan*, PLAINTIFF-Appellant, v. *Chesapeake & Ohio Railway Co*, DEFENDANT-Appellee.

CURRENT COUNSEL FOR PLAINTIFF
NAME: *S. Richard Schneider*
ADDRESS: *30555 Southfield Road, Suite 360*
*Southfield, MI 48076*
TELEPHONE: *(313) 647-1430*
SSN (CJA Only): _____

CURRENT COUNSEL FOR DEFENDANT
NAME: *Gene S. Davis*
FIRM NAME: *Driggers, Schultz*
ADDRESS: *888 W. Big Beaver Road, Suite 400*
*Troy, MI 48084*
TELEPHONE: *(313) 362-9000*
SSN (CJA Only): _____
*Robert E. Harrington Jr.*
*30 N. LaSalle Street, Suite 2100*
*Chicago, IL 60602-2585*
*(312) 782-5925*

Fees: District Court Filing Fee Paid: ☒*yes*
Court of Appeals Docket Fee Paid: ☒*yes*
Counsel: ☒*retained*

District Court Judge: *Barbara Hackett*
Court Reporter: *Carol Sapala*

Any hearing or trial: ☒*yes*
If yes, dates: *Jury Trial held 07/24/89-7/28/89*

FROM: *Patrick Paul*, Deputy Clerk DATE: *01/23/90*

THIS PORTION FOR USE IN TRANSMITTING ANYTHING AFTER THE ORIGINAL NOTICE OF APPEAL HAS BEEN SENT

Date Notice of Appeal sent to Court of Appeals: *1/23/90*
The new information sent at this transmittal is *supplemental transcripts* and includes an updated copy of docket entries.

I hereby certify that I have transmitted to the United States Court of Appeals for the Sixth Circuit the annexed documents consisting of __ volume(s) of pleadings, *4* volume(s) of transcript and __ volume(s) of depositions, which constitute the CERTIFIED RECORD ON APPEAL, this *23rd* day of *July*, 19*90*.

/s/ [*Illegible*]
Clerk, United States District Court

DIST.: *0645* OFF.: *2* DOCKET (YR./NUMBER): *87-4410*
FILING DATE (MO./DAY/YR.): *12/10/87* J: *3* N/S: *330* O: *5*
$ DEMAND (Nearest 1,000): *900* JUDGE/MAG. NO.: *4537*
COUNTY: *88888* JURY DEM.: *N*

TITLE: *SULLIVAN* v *CHESAPEAKE & OHIO RAILWAY CO*
CAUSE: *FEDERAL EMPLOYERS LIABILITY*
#1 PLA.: *MICHAEL J. SULLIVAN*
*ROBERT E. HARRINGTON,*
*HENSLEE MONEK & HENSLEE*
*STE. 2100, 30 N. LaSALLE ST., CHICAGO, IL 60602*

#2 DFT.: *CHESAPEAKE & OHIO RAILWAY CO*
*EDWARD H. MACCABE,*
*GORHAM METGE ET AL*
*STE. 1500, 300 W. WASHINGTON, CHICAGO, IL 60606*
*Gene S. Davis, 888 W. Big Beaver Rd.,*
*Ste. 400, Troy, MI 48084*
*Pl S. Richard Schneider, 30555 Southfield Rd.,*
*Ste. 360, Southfield, MI 48076*

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1987

Dec. 10. TRANSFER from US District Court for Northern District of Illinois & Record

1988

Jan. 22. ANSWER by deft. to complaint w/affirmative defenses

NOTICE of substitution of counsel for deft.

INTERROGATORIES by deft. to pltf. & request for production of documents

PROOF of service re: #2-#4

Feb. 1. INTERROGATORIES by pltf., request for production of documents & proof of service

Feb. 29. NOTICE of substitution of counsel for deft. w/proof of service

Mar. 3. NOTICE of scheduling conf. on 3/29/88 @ 2:40 p.m.

Mar. 16. ANSWERS by deft. to interrogatories & request for production of documents & attach.

INTERROGATORIES by deft. to pltf. & request for production of documents w/proof of service

Mar. 24. APPEARANCE, Notice of appearance on behalf of pltf. w/proof of service

Mar. 29. PRETRIAL held Hackett, J.

Apr. 4. REQUEST for admissions to deft.

Apr. 6. SCHEDULING Order; discovery c/o 7/29/88, motion 8/19/88, final pretrial order 11/8/88, final pretrial conf. 11/15/88 @ 2:20 p.m. & trial 11/22/88 Hackett, J.

Apr. 11. MOTION by deft. for imposition of sanctions w/brief, affidavit, notice of hearing to be set & proof of service

~~Apr. 29. ORDER amending briefing schedule; motions for summary judgment by 4/29/88, responses by 5/29/88 & replies by 6/29/88; Stip. Hackett, J~~ entered in error See 87-4470 #7

May 2. ANSWERS by deft. to pltf. request for admissions

MOTION by deft. to compel answers to interrogatories & execution of tax/medical authorizations w/brief, affidavit & notice of hearing to be set

PROOF of service re: #15 & #16

May 6. ANSWERS by pltf. to interrogatories & request for production of documents w/proof of service

RESPONSE by pltf. to deft. motion for imposition of sanction w/brief & proof of service

May 9. RESPONSE by pltf. to deft. motion to compel answers to interrogatories & execution of tax & medical authorizations, exhibits & proof of service

May 11. MOTION by deft. for order permitting defense medical examination new trial w/brief, affidavit, exhibits, notice of hearing to be set & proof of service

NOTICE of taking deposition of Michael Sullivan on 6/16/88 @ 10:00 a.m. w/proof of service, NSI

NOTICE of taking deposition on 5/23/88 @ 10:00 a.m. of Howard Dubin, Geo. Gaffney, James Roy & Daniel Morrison, SI

May 13. REPLY by deft. to pltf. response to motion for imposition of sanctions w/proof of service

May 17. ORDER of reference to Mag Komives & notice of hearing on motion to compel answers to interrogatories & execution of tax & medical authorization on 6/1/88 Hackett, J.

May 18. RESPONSE of Pltf. Sullivan to Deft.'s Motion re: a defense medical exam w/brief and proof of service

May 26. SUPPL. Interrogs. re: Experts by Pltf. Sullivan

June 2. LETTER to court from counsel withdrawing M/to Compel set for hearing on 6/01/88 @ 10:00 a.m.

June 9. ORDER Denying D/M/for Sanctions w/cert. of mailing Hackett, J.

June 22. SUPPLEMENTAL interrogatories of pltf. to deft. w/proof of service

June 23. ORDER Granting D/M/for Medical Exam of Pltf. no later than 45 days prior to trial w/proof of service Hackett, J.

July 12. NOTICE of taking deposition for Dr. Victor Horvitz on July 22, 1988 at 10:00 a.m. SI

Aug. 9. NOTICE of taking deposition of M. Karbal, C. Najarian, and West Oakland Ambulatory Clinic on August 18, 1988 at 10:00 a.m. SI

Aug. 10. MOTION of plaintiff for leave to file instanter amended complaint and adding count II, with brief, and proof of service

Aug. 18. MOTION of plaintiff for summary judgment, with brief exhibits and proof of service.

Aug. 26. ORDER of reference to Mediation Tribunal Association Hackett, J.

Sept. 1. RESPONSE of the defendant to the plaintiff's motion for summary judgment, with brief and proof of service

Sept. 6. ORDER granting plaintiff's motion to leave and giving defendant 21 days to file his answer to count II, with proof of service
dd 9/13/88 Hackett, J.

Sept. 9. NOTICE of taking of deposition of Dr. K. Gitlin, and St. Joseph Hospital at 10:00 a.m. on 9/20/88, with proof of mailing

Sept. 12. REPLY of the plaintiff to the defendant's answer to the plaintiff's motion, with proof of service

Sept. 28. ANSWER of the defendant CSX to the plaintiff's amended complaint, with affirmative defenses and proof of service

Oct. 17. NOTICE of taking of deposition of Howard Dubin and Daniel Morrison, to be taken on 10/26/88 at 10:00 a.m.

Oct. 31. NOTICE of taking of deposition of Daniel Morrison to be taken on Nov. 8, 1988 at 3:30 p.m. NSI

Nov. 8. NOTICE of taking of deposition de bebe esse of Dr. Michael Karbal to be taken on 11/16/88 at 3:00 p.m. NSI

NOTICE of taking of deposition de bebe esse of Dr. James Roy to be taken on 11/17/88 at 3:00 p.m. NSI

PROOF of service re: #44, 45

Nov. 10. RENOTICE of taking of deposition debene esse of James Roy to be taken on 11/21/88 at 10:00 a.m. with proof of service NSI

ORDER denying the plaintiff's motion for summary judgment, with proof of mailing
dd 11/15/88 Hackett, J.

Nov. 14. NOTICE of taking of deposition of Howard Dubin to be taken on 11/16/88 at 5:00 p.m.,w with proof of service NSI

AMENDED notice of taking of deposition of Daniel Morrison to be taken on 11/22/88 at 3:00 p.m., with proof of service NSI

MOTION of the plaintiff for continuance, with brief and affidavit

Nov. 15. FINAL pretrial held, trial date set for 11/29/88 at 8:30 a.m. dd 11/17/88 no CRP Hackett, J.

Nov. 21. NOTICE of taking of deposition of Joseph Thomasino to be taken on 11/25/88 at 10:00 a.m. SI

Nov. 23. NOTICE of taking of video deposition of Melvin Wold [*sic*] to be taken on 11/28/88 at 5:00 p.m., with proof of service NSI

Dec. 1. MOTION of the plaintiff in limine to bar any reference to discipline that which [*sic*] has been assessed by the defendant, with brief

MOTION of the plaintiff in limine to bar any evidence on the issue of contributory negligence Count I, with brief

MOTION of the plaintiff in limine to bar any reference to prior injuries which may have been incurred by the plaintiff, with brief

MOTION by the plaintiff in limine to bar evidence of benefits received by the plaintiff from collateral sources, with brief

PROOF of service re: #54-57

*SEE COMPUTER FOR FUTURE ENTRIES –*

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*– DOCKET ENTRIES CONTINUED*
*(Docket as of July 23, 1990 9:32 am)*

1989

Jan. 11. NOTICE by defendant of taking deposition of Alexander Enriquez 1/20/90 at 10:00 a.m. NSI [Entry date 01/12/89]

Jan. 13. NOTICE by plaintiff of taking deposition of Arnold Eisenman 1/18/89 at 1:00 p.m. NSI with proof of service by mailing

EMERGENCY MOTION by defendant Chesapeake CO to quash, deposition of Dr. Eisenman [Entry date 01/17/89]

RESPONSE by plaintiff Michael J. Sullivan to motion to quash [61-1] with brief, and exhibits [Entry date 01/17/89]

Jan. 17. TELE-CONFERENCE held regarding defendant Chesapeake & Ohio RR's motion to quash deposition. Motion heard and denied — Magistrate Paul J. Komives

NOTICE by plaintiff of taking deposition of Arnold Eisenman 1/11/89 at 1:00 p.m.
NSI with proof of service [Entry date 1/18/89]

MEMORANDUM by defendant Chesapeake CO in support of motion to quash by Chesapeake CO [61-1] [Entry date 01/18/89]

Jan. 18. ORDER by Judge Barbara K. Hackett, referring case to Magistrate Komives, and notice of hearing on motion to quash by Chesapeake CO [61-1] without a date set Hackett, J.

ORDER by Magistrate Paul J. Komives denying the emergency motion to quash the deposition of Arnold Eisenman, by Chesapeake CO [61-1]

MINUTE SHEET — Telephone conference regarding the defendant's motion to quash the deposition of Arnold Eisenman heard, and denied. No Court Reporter. Komives, M.

Jan. 23. NOTICE by plaintiff of taking deposition of Arnold Eisenman D.O. 2/1/89 at 12:00 noon NSI [Entry date 01/24/89]

Jan. 26. OBJECTIONS by defendant Chesapeake CO to motion to quash by Chesapeake CO [61-1] with proof of mailing [Entry date 01/27/89]

Jan. 27. TRIAL brief by plaintiff Michael J. Sullivan, with proof of mailing

Jan. 30. ORDER by Judge Barbara K. Hackett granting motion to quash by Chesapeake CO [61-1], with proof of mailing [Entry date 01/31/89]

Feb. 6. NOTICE by plaintiff of taking supplemental deposition of Dr. Daniel Morrison 2/15/89 at 3:00 p.m. NSI with proof of mailing

MOTION by plaintiff Michael J. Sullivan for reconsideration of order [70-1], with brief, exhibits, and proof of mailing
[Entry date 02/07/89]

MOTION by plaintiff Michael J. Sullivan to amend, the pretrial, order with brief, exhibits, and proof of mailing [Entry date 02/07/89]

Apr. 3. SCHEDULE: settlement conference set for 4:00 4/25/89 before Judge Barbara K. Hackett

Apr. 7. NOTICE of settlement conference [Entry date 04/11/89]

Apr. 17. ATTORNEY added for Michael J. Sullivan — Robert E. Harrington, Jr., S. Richard Schneider

ATTORNEY added for Chesapeake CO — Gene S. Davis

Apr. 18. NOTICE of to [*sic*] counsel that he is not admitted to practice in federal court [Entry date 04/20/89]

Apr. 24. RESPONSE by defendant Chesapeake CO to plaintiff's motion in limine to bar any reference to discipline which has been assessed by defendant, with brief, proof of mailing [Entry date 04/25/89]

RESPONSE by defendant Chesapeake CO to plaintiff's motion in limine to bar any evidence on the issue of contributory negligence — count I, with brief [Entry date 04/25/89] [Edit date 04/25/89]

RESPONSE by defendant Chesapeake CO to plaintiff's motion in limine to bar evidence of benefits received by plaintiff from collateral sources, with brief [Entry date 04/25/89]

Apr. 25. SETTLEMENT conference held — Judge Barbara K. Hackett

SCHEDULE: jury trial set for 8:30 7/11/89 before Judge Barbara K. Hackett

Apr. 28. ORDER by Judge Barbara K. Hackett denying motion for reconsideration of order [70-1] by Michael J. Sullivan [72-1], with proof of mailing [Entry date 05/01/89]

May 15. LETTER, from Edward H. MacCabe stating that he does not represent Chesapeake & Ohio Railway in this district [Entry date 05/17/89]

June 14. REPLY by plaintiff Michael J. Sullivan to motion response by Chesapeake CO [76-1] [Entry date 06/15/89]

REPLY by plaintiff Michael J. Sullivan to defendant's response on collateral source [Entry date 06/15/89]

June 20. ORDER by Judge Barbara K. Hackett denying motion to amend by Michael J. Sullivan [73-1], with proof of mailing [Entry date 06/21/89]

June 23. NOTICE by defendant Chesapeake CO of taking physical examination, with proof of mailing [Entry date 06/26/89]

July 10. NOTICE by defendant of taking deposition of Dr. Melvyn Wolf 07/14/89 @ 2:30 p.m. NSI, with proof of mailing

July 17. RESPONSE by plaintiff Michael J. Sullivan to defendant's motion in limine to preclude testimony of J. Crawford regarding case with brief, exhibits and proof of mailing [Entry date 07/19/89]

July 18. VOIR DIRE held before Magistrate Paul J. Komives — Court Reporter: Denise Mosby (jurors on standby for trial)

MOTION by defendant Chesapeake CO in limine to preclude testimony of J. Crawford with brief, exhibits and proof of mailing [Entry date 07/19/89]

RESPONSE by plaintiff Michael J. Sullivan to plaintiff's motion in limine regarding prior accidents, with brief [Entry date 07/19/89]

July 20. MOTION by plaintiff Michael J. Sullivan to bar the videotape prepared by the defendant, with proof of mailing [Entry date 07/21/89]

July 24. PROOF of mailing of defendant's response to plaintiff's motion in limine regarding prior accidents.

JURY trial begun — Judge Barbara K. Hackett — Court Reporter: Fred Pratt [Entry date 07/25/89]

JURY trial continued to 8:30 7/25/89 — Judge Barbara K. Hackett — Court Reporter: Fred Pratt [Entry date 07/25/89]

July 25. JURY trial held and continued to 8:30 7/26/89 — Judge Barbara K. Hackett — Court Reporter: Fred Pratt

FINAL pretrial order by Judge Barbara K. Hackett [Entry date 07/26/89]

DEPOSITION of Daniel L. Morrison, D.O., taken on 2/15/89 [Entry date 07/26/89]

DEPOSITION of Howard L. Dubin, D.O., taken on 11/16/89 [Entry date 07/26/89]

DEPOSITION of Daniel L. Morrison, D.O., taken on 11/22/88 [Entry date 07/26/89]

July 26. JURY trial held and continued to 8:30 7/27/89 — Judge Barbara K. Hackett — Court Reporter Fred Pratt

July 27. JURY trial held — Judge Barbara K. Hackett — Court Reporter: Fred Pratt [Entry date 07/31/89]

JURY trial concluded — Judge Barbara K. Hackett — Court Reporter: Fred Pratt
[Entry date 07/31/89]

July 28. TRIAL brief by defendant Chesapeake CO
[Entry date 07/31/89]

DEPOSITION of L. James Roy, M.D. taken on 11/21/88 @ 10:00 a.m. [Entry date 07/31/89]

DEPOSITION of Michael Karbal, M.D. taken on 11/16/88 [Entry date 07/31/89]

VERDICT form [Entry date 07/31/89]

JURY verdict entered for Michael J. Sullivan and against Chesapeake CO — Judge Barbara K. Hackett — Court Reporter: Fred Pratt
[Entry date 07/31/89]

July 31. JUDGMENT entered by Judge Barbara K. Hackett for Michael J. Sullivan against Chesapeake CO for $40,000 [Entry date 08/01/89]

PROPOSED JURY instructions filed by plaintiff Michael J. Sullivan [Entry date 08/02/89]

PROPOSED JURY instructions filed by defendant Chesapeake CO [Entry date 08/02/89]

Aug. 10. MOTION by plaintiff Michael J. Sullivan for new trial, with brief [Entry date 08/14/89]

MOTION by plaintiff Michael J. Sullivan to vacate judgment and all proceedings due to trial court's failure to disqualify itself pursuant to 28 USC Sec. 455(b), with brief and attachments, with proof of mailing on motion for new trial and motion to vacate judgment
[Entry date 08/14/89]

Aug. 21. RESPONSE by defendant Chesapeake CO to motion to vacate judgment and all proceed-

ings and defendant's request for sanctions, [102-1] with exhibit [Entry date 08/22/89]

MEMORANDUM by defendant Chesapeake CO in support of defendant's response to plaintiff's motion to vacate judgment and all proceedings and defendant's request for sanctions. CO [103-1] [Entry date 08/22/89]

RESPONSE by plaintiff to motion for new trial [101-1] [Entry date 08/22/89] [Edit date 09/07/89]

MEMORANDUM by defendant Chesapeake CO in support of defendant's response to plaintiff's motion for new trial [105-1] [Entry date 08/22/89]

MOTION by defendant Chesapeake CO for new trial with brief. Hearing to be set by the court [Entry date 08/22/89]

MOTION by defendant Chesapeake CO for judgment notwithstanding the verdict, with brief [Entry date 08/22/89]

PROOF of mailing of responses and motions filed this date [Entry date 08/22/89]

Aug. 29. REPLY by plaintiff Michael J. Sullivan to motion response by Chesapeake CO [105-1], with proof of mailing [Entry date 08/30/89]

REPLY by plaintiff Michael J. Sullivan to motion response by Chesapeake CO [103-1], with proof of mailing [Entry date 08/30/89]

Sept. 7. REPLY by defendant Chesapeake CO to motion response by plaintiff [105-1], with proof of mailing

Sept. 8. RESPONSE by plaintiff Michael J. Sullivan to motion for judgment notwithstanding the ver-

dict [108-1], with brief and proof of mailing [Entry date 09/11/89]

RESPONSE by plaintiff Michael J. Sullivan to motion for new trial [107-1], with brief & proof of mailing [Entry date 09/11/89]

Sept. 13. SUPPLEMENTAL brief in support of response to plaintiff's motion to vacate judgment and all proceedings by Chesapeake CO [103-1], with proof of mailing [Entry date 09/18/89]

Oct. 16. TRANSCRIPT of proceedings of jury trial taken on 7/26/89 [Entry date 10/18/89]

Dec. 28. ORDER by Judge Barbara K. Hackett denying motion to vacate judgment [102-1] and denying request for sanctions [Entry date 01/02/90]

ORDER by Judge Barbara K. Hackett denying motion for judgment notwithstanding the verdict [108-1] [Entry date 01/02/90]

ORDER by Judge Barbara K. Hackett denying motion for new trial [101-1], with proof of mailing [Entry date 01/02/90]

1990

Jan. 23. APPEAL by plaintiff Michael J. Sullivan of order [119[1], order [118-1], order [117-1], order [98-1] to USCA
— FEE: paid — Receipt #: 249817

CERTIFIED copy of appeal by Michael J. Sullivan [120-1] and docket transmitted to USCA

PROOF of mailing of [120-1]

Feb. 6. ACKNOWLEDGEMENT from USCA of receipt of appeal by Michael J. Sullivan [120-1]
— appeal case #90-1136 [Entry date 02/07/90]

DESIGNATION of record by plaintiff Michael J. Sullivan for appeal by Michael J. Sullivan [120-1] [Entry date 02/08/90]

Feb. 9. COPY of TRANSCRIPT order form by plaintiff Michael J. Sullivan for requesting transcript of: 7/21-7/31/89 — appeal case #90-1136 [Entry date 02/13/90]

Mar. 7. ORDER by Judge Barbara K. Hackett denying motion for new trial by Chesapeake CO [107-1], with proof of mailing [Entry date 03/08/90]

Mar. 30. APPEAL by defendant Chesapeake CO of order [126-1] to USCA — FEE: PAID — Receipt #: 252087 [Entry date 04/02/90]

Apr. 2. PROOF of mailing of appeal #127

CERTIFIED copy of appeal by Chesapeake CO [127-1] and docket transmitted to USCA

Apr. 18. ACKNOWLEDGEMENT from USCA of receipt of appeal by Chesapeake CO [127-1] — appeal case #90-1412 [Entry date 04/19/90]

Apr. 19. TRANSCRIPT order form by defendant Chesapeake CO for appeal by Chesapeake CO [127-1]. Deft. is relying on all other transcripts ordered by plaintiff — appeal case #90-1412 [Entry date 04/24/90]

DESIGNATION of record by defendant Chesapeake CO for — appeal case #90-1412 [Entry date 04/24/90]

DESIGNATION of record by plaintiff Michael J. Sullivan for — appeal case #_____ [Entry date 04/24/90]

PROOF of mailing of 132 and 133 [Entry date 04/24/90]

June 7. RECORD of appeal by Chesapeake CO [127-1] transmitted to USCA — # of volumes: 5 — # of transcripts: 2 — # of depositions: 5

June 19. ACKNOWLEDGEMENT from USCA of receipt of appeal by Chesapeake CO [127-1] [Entry date 06/21/90]

July 20. TRANSCRIPT of jury trial proceedings taken on 7/24/89 (Vol. I) [Entry date 07/23/90]

TRANSCRIPT of jury trial proceedings taken on 7/25/89 (Vol. II) [Entry date 07/23/90]

TRANSCRIPT of jury trial proceedings taken on 7/26/89 (Vol. III) [Entry date 07/23/90]

TRANSCRIPT of jury trial proceedings taken on 7/27/89 (Vol. IV) [Entry date 07/23/90]

July 23. SUPPLEMENTAL record transmitted to USCA — # of transcripts: 4

Aug. 7. ACKNOWLEDGEMENT from USCA of receipt of appeal by Chesapeake CO [127-1] of receipt of supplemental record [Entry date 08/08/90]

Aug. 14. ACKNOWLEDGEMENT from USCA of receipt of — appeal case #90-1136/1412 of receipt of supplemental transcripts [Entry date 08/15/90]

Oct. 24. TRANSCRIPT of jury voir dire proceedings taken on 7/18/89 [Entry date 10/29/90]

Dec. 11. TRANSCRIPT of proceedings taken on 7/27/89 for jury trial [0-0] [Entry date 12/12/90]

1991

Jan. 15. VIDEOTAPE DEPOSITION transcript of Melvyn D. Wolf taken on 7/14/89 [Entry date 01/16/91]

VIDEO DEPOSITION transcript of Melvyn D. Wolf, M.D. taken on 11/28/88 [Entry date 01/16/91]

TRANSCRIPT of tape recorded hearing regarding Michael J. Sullivan taken on 6/12/87
[Entry date 01/16/91]

*–Docket as of January 17, 1991 1:28 pm–*

# APPENDIX C

## PLAINTIFF'S MOTION TO AMEND THE PRETRIAL ORDER

(United States District Court —
Eastern District of Michigan — Southern Division)

(Filed February 6, 1989)

(MICHAEL J. SULLIVAN, Plaintiff, vs. CHESAPEAKE & OHIO RAILWAY COMPANY, a corporation, Defendant — CASE NO. 87-74410; JUDGE BARBARA K. HACKETT)

Now comes the plaintiff, MICHAEL J. SULLIVAN, by his attorneys and moves the Honorable Court to grant him leave to amend the pretrial order by adding the name of Dr. Arnold Eisenman. In support of this motion plaintiff states as follows:

1. Subsequent to the submission and entering of the pretrial order plaintiff was examined by Dr. Arnold Eisenman at the request of plaintiff's counsel. A copy of Dr. Eisenman's report concerning his examination of November 17, 1988, is attached as Exhibit A.*

2. The purpose of this scheduled exam was to rebut the examination and potential testimony of defendant's expert medical witness, Dr. Melvin Wolf, who examined the plaintiff on October 7, 1988.

3. On June 14, 1988, this Court issued an Order granting defendant's motion to have plaintiff examined within 45 days of the scheduled trial, which was originally scheduled to begin on November 22, 1988. Plaintiff had objected to defendant's motion expressing concern that he would not have sufficient time to rebut the find-

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* [*Printer's Note:* **No attachments referred to herein are being reproduced in this Appendix.**]

ings of the examination. Attached as Exhibit B is a copy of the Court's Order.

4. Attached as Exhibit C is the report of Dr. Wolf dated October 10, 1988, and sent to the plaintiff on October 31, 1988. Dr. Wolf's deposition in this cause was taken on November 28, 1988 subsequent to the submission of the final pretrial order. The purpose of Dr. Eisenman's testimony is to rebut the physical findings of Dr. Wolf as well as several new opinions stated at his deposition which were *not* covered in his initial report. One such opinion offered by Dr. Wolf was that the plaintiff should be reevaluated after an attempt to return to work. Subsequently, plaintiff was ordered to return to work by the defendant, and subsequently the plaintiff was evaluated by Dr. Eisenman.

5. Attached as Exhibit D is a letter dated November 17, 1988 from plaintiff's counsel, Robert B. Thompson, to defendant's counsel Gene S. Davis. The letter points out that plaintiff will likely use a rebuttal witness, Dr. Arnold Eisenman. This letter was sent *the day* that Mr. Sullivan saw Dr. Eisenman. It is plaintiff's position that this letter complied with the Court's June 14, 1988 order and the Court's order regarding the Final Pretrial Order which states: "If, after submission of the Final Pretrial Order, is [*sic*] develops that other witnesses will or may be called to testify at trial, their names, and addresses and general subject matter of their testimony shall be reported to other counsel at the earliest possible date."

6. Since Dr. Eisenman was to be a rebuttal witness it was plaintiff's understanding that it was not necessary to list him on the pretrial order. More importantly, at the time the pretrial order was filed, plaintiff had not been examined by Dr. Eisenman. Plaintiff received Dr. Eisenman's December 14, 1988 report on Saturday December 17 and mailed it to defendant on December

19. It is important to note that when the Court granted leave for the defendant to have the plaintiff examined by a physician of their choosing within 45 days of trial, plaintiff objected on the basis that would not provide him with sufficient time to obtain any rebuttal evidence that might be necessary as a result of any adverse medical examination. While the exam took place within the 45 days, plaintiff did not get the report of Dr. Wolf (which is crucial to the determination of whether another medical exam is necessary) until after October 31, 1988, just 15 days before the Final Pretrial Order.

7. Rule 16(e) of the Federal Rules of Civil Procedure provides that a final pretrial order may be modified to prevent manifest injustice. It is plaintiff's position that to preclude him from calling Dr. Eisenman as a witness in this cause would clearly be injustice. Dr. Wolf, from Flint, Michigan, testified that he has repeatedly been used as a medical examiner by both this defendant and the other employers in similar type and case. Dr. Eisenman's report has physical findings which are in direct contradiction to the physical findings noted by Dr. Wolf both in his report and his deposition. In order for the jury to fully appreciate the full extent and nature of plaintiff's injury, and in light of Dr. Wolf's testimony in this case, plaintiff should be allowed to present the testimony of Dr. Eisenman.

*MEMORANDUM IN SUPPORT*

Plaintiff relies on Rule 16(e) of the Federal Rules of Civil Procedure, this Court's orders of June 14, 1988 and the directions of the Court in regards to the Final Pretrial Order. Further, plaintiff states that defendant has been given the same amount of notice, copies of report and time for preparation for the testimony of Dr. Eisenman as plaintiff had for Dr. Wolf's deposition. If

defendant requests, plaintiff will provide time for a discovery deposition prior to Dr. Eisenman's deposition.

It seems to plaintiff that this Court's July 14, 1988 order suggests plaintiff would have 45 days since defendant did not tender the report until 15 days before the Final Pretrial Conference and 17 days before the Dr. Eisenman exam. Once the examination took place, plaintiff has promptly advised defendant of the exam, the physician who conducted the exam and sent the doctor's report. Defendant has not been prejudiced.

In the interest of justice, plaintiff respectfully requests that the plaintiff be allowed to amend the pretrial order and add Dr. Eisenman as a witness.

/s/ ROBERT B. THOMPSON
S. RICHARD SCHNEIDER, CO-COUNSEL
Attorneys for Plaintiff

HENSLEE, MONEK & HENSLEE
30 North LaSalle Street, Suite 2100
Chicago, Illinois 60602

STATE OF ILLINOIS
COUNTY OF COOK

JOYCE SUCHINSKI, being first duly sworn on oath, deposes and says that she served a true and correct copy of the above and foregoing MOTION TO AMEND THE PRETRIAL ORDER and SUPPORTING MEMORANDUM upon Gene S. Davis, DRIGGERS, SCHULTZ, HERBST & PATERSON, 888 West Big Beaver Road, Troy, Michigan 48084, by Federal Expressing same located at 2 North LaSalle Street, Chicago, Illinois 60602 on this 3rd day of February, 1989.

/s/ JOYCE SUCHINSKI

SUBSCRIBED and SWORN to before me
this 3rd day of February, 1989.
/s/ Susan M. Hayes, NOTARY PUBLIC, State of Illinois
My commission Expires Aug. 3, 1991

# APPENDIX D

## FINAL PRE-TRIAL ORDER

(United States District Court —
Eastern District of Michigan — Southern Division)

(Entered July 25, 1989)

(MICHAEL J. SULLIVAN, Plaintiff, vs. CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation, Defendant — Case No. 87-74410; JUDGE BARBARA K. HACKETT)

*I.*

STATEMENT OF PLAINTIFF'S CLAIMS
INCLUDING LEGAL THEORIES

Plaintiff's Two Count Complaint is brought pursuant to the Federal Employer's Liability Act. Plaintiff, born April 1, 1952, has been an employee of Defendant since April 26, 1973.

*COUNT I:*

Plaintiff was injured on May 13, 1987 which [*sic*] while in the employ of Defendant while working as a brakeman in Dearborn, Michigan. At the time of his accident Plaintiff was working in Rougemere Yard on track 5 and was attempting to open a knuckle on a railroad car[.] [*T*]he knuckle is that portion of a railroad car which is used to couple onto other cars. As Plaintiff was attempting to open a knuckle, he was on the South side of track 5, after having attempting [*sic*] to use the operating lever, in order that a coupling could made [*sic*] to couple cars in order to further switching operations.

Pursuant to his duties Plaintiff stepped between the rail and grabbed the knuckle with his right hand and was operating the operating lever with his left hand. At

the point in time while Plaintiff was in this position, the knuckle started to fall off the end of the car due to missing knuckle pin and as Plaintiff jumped away from the car his foot caught the rail and he twisted and fell on his left knee. There were no eyewitnesses present. Immediately following this accident Plaintiff filled out an injury report and the car in question was inspected. The car inspection performed by Plaintiff's Trainmaster and its car inspectors corroborate the Plaintiff.

Plaintiff sustained injury to his left knee which included surgery for the following conditions; condylar defect, centrum lateral medial femoral condyle, chondromalacia with hyperemic synovitis of the left knee. Plaintiff has been permanently disqualified from his regular employment as a railroad brakeman. Plaintiff claims damages of loss of past and future wages, fringe benefits, past and future disability, and past and future pain and suffering.

Plaintiff alleges that Defendant was negligent in that:

A. Failure to provide a safe place to work.

B. Failed to exercise ordinary care to furnish Plaintiff with a car and with operative coupler equipment.

C. Failed to inspect coupler when ordinary inspection was disclosed [*sic*] the coupler was defective.

D. Failed to maintain and repair coupler of said car.

E. Failed to warn Plaintiff when timely warning would have averted injury to him.

F. Using on its line a car with a coupler in violation of the coupler section of the Safety Appliance Act.

G. In using on its line a car with a defective coupler as prescribed by the applicable provisions of the Federal Rail Safety Act and/or the regulations of the Federal Railroad Administration.

Plaintiff has a pending Motion for Summary Judgment on these issues.

COUNT II: [HAND-WRITTEN: Plaintiff (¶) has dropped this Count.]

Subsequent to Plaintiff's left knee injury, May 13, 1987 Plaintiff came under the care and treatment of several physicians and remained under continual medical care and treatment up to and including March 25, 1988. During this period of time, Plaintiff was advised by his treating physicians that he was disabled from his railroad occupation. Defendant was kept advised of the Plaintiff's disability and his doctors' opinion that he was unable to return to work. Defendant was further advised that Plaintiff would need surgery on his left knee to alleviate his condition. Notwithstanding this information, Plaintiff received a written order from Defendant on March 23, 1988 that [t]he requested leave of absence was denied and that Plaintiff should arrange to return to work in order to protect his job. Plaintiff was advised that failure to comply with this order would result in the Plaintiff being taken out of service and fired. Plaintiff was ordered back to work without the Defendant's medical officer having conducted a recent medical examination. Plaintiff reported back to work on March 25, 1988. As a result of his attempt to perform the duties of a brakeman, Plaintiff's previous injuries in his disability from his left knee were aggravated. Plaintiff was not able to complete his tour of duty that day.

Plaintiff alleges that Defendant was negligent in that:

A. Negligently ordered Plaintiff back to work contrary to the recommendations of his treating physicians.

B. Ordering Plaintiff back to work without having Plaintiff examined by a company examiner or medical officer.

BEST AVAILABLE COPY

2.

STATEMENT OF DEFENDANT'S DEFENSES OR CLAIMS

Plaintiff has testified that he was injured when he jumped out of the way of a possibly falling coupler on a moving railcar. The coupler was allegedly defective because the pin, which is used to hold the knuckle in place was not in the knuckle. Plaintiff further testified that he did not observe the knuckle pin missing prior to attempting to open the coupler. When he attempted to open the coupler on the railcar, that was moving away from him, he observed the pin missing and claims that the knuckle appeared to be falling out. Therefore he jumped out of the way, tripping over a rail. It is Defendant's contention and the evidence will show that Plaintiff's alleged injuries were not caused in any way by any defective equipment of Defendant.

It is the Defendant's contention the evidence will show that the knuckle was inspected after the accident and it was determined that the knuckle had not fallen out and was in place and that the pin, which is twelve to thirteen inches in length and easily observable if it is in place, was in fact missing.

It is the Defendant's contention that the evidence will show the missing pin in no way caused Plaintiff's injuries. Plaintiff's injuries were, in fact, caused by his own extremely careless actions. Subsequent to the accident, Plaintiff was disciplined for violation of several company rules in relation to this accident. After a hearing and testimony of witnesses were taken, it was determined that the Plaintiff violated Chessie Operating Rules 2122, 2125 and 2044. These rules provide:

> *Operating Rule 2122* – Going between or in front of moving engines or cars to coupler [*sic*] or uncouple, or adjust couplers, knuckles, or

lock pins; or to manipulate angle cocks is prohibited.

*Operating Rule 2155* – While equipment is standing, that coupling appliances, including knuckle pins, in place and in good order, and make any necessary adjustments to ensure proper coupling. Always stay to the side rather than directly in front when adjusting knuckles or couplers. If equipment is found to be defective, it must be reported to a responsible officer.

*Operating Rule 2044* – Employee on or about tracks must always be alert to keep out of danger, exercising care to avoid injury to themselves and others. Nothing in these rules is to be construed as relieving any employee from performing his full duty in this respect.

It is further the Defendant's contention and the evidence will show that Plaintiff suffered a relatively minor injury and has not returned to work of any sort, for a year and a half. It is further the Defendant's contention that the evidence will show the Plaintiff could return to work at this time.

*3.*

STIPULATION OF FACTS

1. Defendant submits to the jurisdiction of this Court under Provisions of Title 45 U.S. Code Sect. 56 and Title 28 – U.S. Code Sect. 1331.

2. The Defendant CHESAPEAKE AND OHIO RAILWAY COMPANY is a corporation engaged in operating a railroad as a common carrier engaged in interstate commerce between the various states of the United States, and is subject to service of process to the jurisdiction of this Court.

3. At the time of the accident and injury alleged herein Plaintiff was employed by Defendant as a brakeman, and his duties as such were in furtherance of interstate commerce for Defendant. At said time both Plaintiff and Defendant were subject to the Act of Congress known as the Federal Employers' Liability Act, 45 U.S. Code sections 51-60, and the Federal Safety Appliance and Equipment Act, 45 U.S. Code sections 1-32, and the amendments thereto.

[HAND-WRITTEN: 4. See Appendix.]

4.

ISSUES OF FACT REMAINING TO BE LITIGATED

1. That on or about May 13, 1987, about 7:30 p.m., plaintiff was injured while working for defendant at or near Dearborn, Michigan.

2. At said time plaintiff was assigned to job in Rougemere yard engaged in switching operations. Plaintiff was at east end of No. 5 track coupling cars. Plaintiff operated cutting lever of coupler. The knuckle of the coupler failed to open so that plaintiff had to step between cars to open knuckle manually at which time the knuckle fell from the coupler, and in attempting to avoid having knuckle fall on him plaintiff fell and was injured.

3. Plaintiff was acting at all times alleged herein within the scope of his employment and in furtherance of defendant's business, and it was its duty to exercise ordinary care to furnish plaintiff with a reasonably safe place in which to work and to furnish plaintiff with car and operative coupler equipment; to inspect, maintain and repair coupler; to warn plaintiff, and it was its absolute duty to have coupler equipment in operative condition in compliance with the coupler section of the Safety Appliance Act, to avert injury to plaintiff.

4. Defendant at the time and place alleged, notwithstanding its duties to plaintiff, was guilty of unlawful conduct and was careless and negligent in one or more of the following particulars and thereby caused injury to plaintiff:

a) In failing to exercise ordinary care to furnish plaintiff with a reasonably safe place in which to work.

b) In failing to exercise ordinary care to furnish plaintiff with car with operative coupler equipment.

c) In failing to inspect coupler of car when ordinary inspection would have disclosed that coupler was defective and which could have been repaired in time to have averted injury to plaintiff.

d) In failing to maintain and repair coupler of car when it knew or should have known and foreseen that plaintiff would be subjected to jeopardy of injury in operating cutting lever of coupler.

e) In failing to warn plaintiff when timely warning would have averted injury to him.

f) On using on [*sic*] its line car with inoperative coupler in violation of coupler section of the Safety Appliance Act.

5. The plaintiff sustained serious injuries and aggravated pre-existing latent physical infirmities resulting in whole or in part from the unlawful and careless and negligent acts and omissions of defendant. By reason of the aforesaid injuries, plaintiff has suffered and will continue to suffer disability and physical pain; he has incurred and will continue to incur medical expenses; he has [*sic*] generally disabled from gainful employment and will continue to be disabled from any employment in the future, and he has lost and will continue to lose wages from his employment.

6. That on or about May 13, 1987, at 7:30 p.m., plaintiff was injured while working for defendant at or near Dearborn, Michigan.

7. Subsequent to the injury of May 13, 1987, plaintiff came under the care and treatment of physicians and remained under continual medical care and treatment up [*to*] and including March 25, 1988, and will continue under the care and treatment for an undetermined period of time in the future. Defendant and defendant's personnel were kept currently advised concerning plaintiff's medical care and treatment and his continuing disability and his inability to return to the work required of him in his employment with defendant.

8. Notwithstanding that defendant and defendant's personnel had been advised by plaintiff's attending physician on Feb. 26, 1988, that plaintiff was under medical care and treatment for left knee injury; that plaintiff was unable to work; that surgery had been recommended for alleviation of the left knee injury and continuing disability, plaintiff received a written order dated March 23, 1988, from defendant's Division Manager, Livonia, Michigan, that requests for leave of absence was denied and that plaintiff should arrange to protect his seniority, and that failure to comply would result in plaintiff's being automatically closed out of service. The aforesaid order was issued to plaintiff without plaintiff having a recent physical examination by defendant's medical officer.

9. Having been compelled by threat of dismissal from his job, plaintiff reported to defendant for work on March 25, 1988, and as a direct and proximate result of attempting to perform the duties of his job plaintiff's injuries and his disability from said injuries were severely aggravated and plaintiff was compelled to discontinue attempting to perform the duties of his job,

and he has become severely disabled and will require further extensive medical care and treatment than if he had not been compelled to return to work, and his future medical expenses and loss of wages will be greatly increased.

10. The defendant had full knowledge of plaintiff's injuries, his medical care and treatment and the extent of his disability, and defendant therefore owed plaintiff the duty of refraining from compelling him to return to work, and it knew or should have known and foreseen that by compelling plaintiff to return to work under threat of dismissal that he would have to return to work and that he would be thereby be [*sic*] in jeopardy of having his injuries aggravated, his recovery impaired and be subjected to further disability and further losses and expenses, and having violated its duty to plaintiff, the defendant caused aggravation of plaintiff's injuries and caused further disability, losses and damages.

11. Liability under FELA and Safety Applicance Act.

12. Causation.

13. Extent of Damages.

14. Plaintiff's Contributory negligence.

*5.*

ISSUES OF LAW TO BE LITIGATED

1. Plaintiff has a pending Motion for Summary Judgment in the above-referenced matter.

2. Liability under FELA and Safety Appliance Act.

3. Causation.

4. Extent of Damages.

5. Plaintiff's Contributory negligence.

*6.*

EVIDENCE PROBLEMS LIKELY TO ARISE AT TRIAL

A. Plaintiff will file Motions in Limine on the following issues.

1. Motion to Bar Evidence of Collateral Source Payments to the Plaintiff.
2. Motion to Bar Evidence of Prior and current Disciplinary Infractions of Plaintiff.
3. Motion to Bar Evidence of Prior Injuries or Medical Conditions unconnected to this occurrence or Plaintiff's Injury.
4. Motion to bar evidence with respect to plaintiff's possible contributory negligence and possible violation of defendant's safety rules with respect to Count I.

*7.*

WITNESSES

A. Witnesses for Plaintiff

*Will be called*

1. Plaintiff
2. Trainmaster Crawford
3. Dr. Daniel Morrison
4. Dr. Dubin — by deposition
5. Professor Michael Thomson

*May be called*

1. Dr. E. Montales
2. J. R. Paulowski
3. R. L. Murphy
4. L. Dardin
5. Andy Hill
6. Charles Franklin

B. DEFENDANT'S WITNESSES

*May be called*

1. Dr. Karbal
2. Dr. Dubin
3. Dr. Morrison
4. Dr. Roy
5. Dr. Gaffney
6. Dr. Horvitz
7. Plaintiff
8. Plaintiff's wife
9. J. R. Horner
10. J. Crawford
11. John Pawlowski
12. R. L. Murphy
13. L. Darden
14. Andrew J. Hill
15. Charlie Franklin
16. Kathy Thompson-Williams
17. J. M. Kelly
18. Carolyn Haire
19. Edith Boyer
20. Dr. Gitlin
21. Dr. A.T. Zadeth
22. Dr. E. Montales
23. Michael Thomson
24. Willaim [*sic*] Sieloff
25. Samuel Goldstein
26. Dr. Najarian
27. Dr. Alvarez
28. Dr. Melvin Wolf
29. Dr. Jalkanen
30. R. Allen
31. Sam Allison
32. Records Custodians
    for all listed treating physicians
33. Records Custodian
    of West Oakland Ambulatory Clinic

34. Records Custodian
of Garden City Orthopedics
35. Records Custodian
of Detroit Industrial Clinic
[HAND-WRITTEN: 36. William Braman
37. James Hooper]

*Objections to Defendant's Witness List*

Defendant's witness list violates this court's order when it states Defendant's proof will last 2-3 days and yet no witnesses are listed as "will be called." Defendant is trying to obscure what evidence it tends to produce.

Plaintiff objects to Samuel Goldstein, who, on information and belief is a rehabilitation expert who has never been identified in discovery.

8. A copy of Dr. Thomson's report is attached.

9. Estimated length of trial.

A. Time for Plaintiff's proofs 2-3 days

B. Time for Defendant's proofs

C. Jury trial demanded.

D. Do not stipulate
to less than an unanimous verdict

E. Plaintiff does not stipulate
to a verdict of less than six.

10. Parties do not agree to trial by magistrate.

11. Plaintiff's Counsel has not discussed this case with Defendant's Claim Representative to date. Plaintiff plans to contact Defendant's representative regarding settlement discussion in the near future.

/s/ Barbara K. Hackett
UNITED STATES DISTRICT JUDGE

Date: July 24, 1989

APPROVED AS TO FORM AND SUBSTANCE
/s/ Laurence C. Acker
Attorney for Plaintiff
/s/ Mary C. O'Donnell
Attorney for Defendant

---

[HAND-WRITTEN ON SEPARATE SHEET OF LEGAL PAPER]:

Appendix

3. STIPULATION OF FACTS

4. Plaintiff is aware that Judge Hackett's husband is an attorney who represents CSX Transportation and he waives any objections to her presiding over this case.

RBT
GSD

# APPENDIX E

## SCHEDULING ORDER - CIVIL
**(Including Instructions for Preparation of Final Pretrial Order)**

(United States District Court —
Eastern District of Michigan — Southern Division)

(Issued March 29, 1988)

(*Sullivan*, Plaintiff, -vs- *Chesapeake R.R.*, Defendant — NO. *87 4410*; HON. BARBARA K. HACKETT)

IMPORTANT: YOU WILL RECEIVE NO FURTHER NOTICE OF THE DATES AND REQUIRED COURT APPEARANCES CONTAINED IN THIS ORDER.

1. Closing date for all discovery: *July 29, 1988*

2. Cut-off date for filing of all motions: *August 19, 1988*

3. Date and time of status conference: _____

NOTE: THE COURT HAS DETERMINED THAT IN THIS CASE DISCOVERY MATERIALS ARE NOT TO BE FILED WITH THE COURT - SEE "A", PAGE 2, *infra*. FURTHER, LOCAL RULE 17(a) REQUIRES THE MOVING PARTY TO SEEK CONCURRENCE OF OPPOSING PARTY *BEFORE* FILING ANY MOTIONS.

4. Date for referral to mediation: *August 19, 1988*

5. Date for submission
of final pretrial order: *November 8, 1988*

(SEE PAGE 2 FOR INSTRUCTIONS
AS TO FINAL PRETRIAL ORDER.)

6. Date and time
of final pretrial conference: *November 15, 1988 @ 2*

TRIAL COUNSEL MUST BE PRESENT AT THIS CONFERENCE, AS WELL AS ALL PERSONS NECESSARY TO MAKE A FINAL DECISION AS TO SETTLEMENT.

7. Trial date: *Nov. 22, 1988* Jury: ✓ Non-Jury:__

8. Other matters: _____

THE FOLLOWING RULES WILL CONTROL PROCEEDINGS IN THIS CASE THROUGH FINAL PRETRIAL

A. *DISCOVERY.* Discovery is to be completed on or before the date indicated in this order or any subsequent amendment. The court determines on a case by case basis whether it is necessary to file discovery materials.

Discovery materials, including depositions upon oral examination and interrogatories, shall *not* be filed unless on order of the court or unless they will be needed by the court to dispose of a pretrial motion. In such cases, the parties *must* file with the court such portions of the discovery material as are necessary for the court to resolve the motion(s) before it.

A notice of the completion of a deposition upon oral examination should be filed so that the docket will accurately reflect the existence of such deposition. (See Local Rule 16(g), eff. 1/13/83).

B. *CONTENT OF FINAL PRE-TRIAL ORDER.* IT IS ORDERED that counsel for *plaintiff* must assume the responsibility for *convening a conference* for all parties to confer and collaborate in formulating a short, concise, final pretrial order (FPTO) which is to be drafted by counsel for plaintiff, approved and signed by counsel for all parties, and submitted to the court for approval and adoption. The FPTO should provide for the signature of the court, which, when signed, will become an Order of the court. The FPTO must be in one document. The court will not accept separate documents proposed by each side.

Once a formal Final Pretrial Order has been issued, this supersedes previous pleadings and orders and con-

trols the trial proceedings. It is expected that motions that would affect the content of the FPTO will be filed and heard prior to the entry of the FPTO.

The proposed FPTO shall contain, under appropriate captions, the following in the order indicated:

1. A concise statement of plaintiff's claim, including legal theories.

2. A concise statement of defendant's defenses and claims, including claims of third-party plaintiffs, and defenses of third-party defendants, including legal theories.

3. A recitation of any facts or other matters to which the parties have stipulated.

4. Issues of fact remaining to be litigated.

5. Issues of law to be litigated.

6. Evidence problems likely to arise at trial.

7. *Witnesses:* Indicate which witnesses *will* be called in the absence of reasonable notice to opposing counsel to the contrary, and which witnesses *may* be called.

   A. Witnesses for plaintiff.

   B. Witnesses for defendant.

   C. If, after submission of the FPTO, it develops that other witnesses will or may be called to testify at the trial, their names and addresses and the general subject matter of their testimony shall be reported to other counsel at the earliest possible date. (This restriction shall not apply to rebuttal witnesses, the necessity of whose testimony cannot be reasonably anticipated before trial.)

   D. Generalized descriptions of witnesses such as "all or any employees of the defendant" are not satisfactory.

8. An *itemized* statement of special damages. Counsel will be requested to stipulate to those items not in dispute.

9. Estimated length of trial.

A. Time for plaintiff's proofs.

B. Time for defendant's proofs.

C. Indicate whether it is a jury or non-jury trial.

D. If a jury trial, do you stipulate to less than a unanimous verdict?

E. If a jury trial, do you stipulate to a unanimous verdict of not less than five if jurors must be excused during the course of the trial?

10. Whether the parties will agree to the trial being conducted by a magistrate.

11. A statement that counsel have met, conferred and considered the possibility of settlement, giving place, time, and date, and the current status of these negotiations as well as plans for further negotiations.

THIS SCHEDULING ORDER CONSTITUTES A DULY ENTERED ORDER OF THIS COURT, AND FAILURE TO COMPLY STRICTLY WITH ALL ITS TERMS, MAY RESULT IN DISMISSAL, DEFAULT JUDGMENT, REFUSAL TO LET WITNESSES TESTIFY, REFUSAL TO ADMIT EXHIBITS, OR OTHER ACTION, INCLUDING THE ASSESSMENT OF SPECIAL COSTS AND EXPENSES, INCLUDING ATTORNEY FEES. ATTENTION IS DIRECTED TO LOCAL RULE 5(b) AND FEDERAL RULES OF CIVIL PROCEDURE 16(f).

/s/ BARBARA K. HACKETT
United States District Judge

/s/ S. Richard Schneider
Counsel for: *Plaintiff*

/s/ Mary C. O'Donnell
Counsel for: *C&O Railway*

# APPENDIX F

## 28 USC §455

28 USC § 455. Disqualification of justice, judge or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to

the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civil organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance of discovery, after the matter was

assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Supreme Court, U.S.
FILED
MAY 4 1992
OFFICE OF THE CLERK

(3)

No. 91-1510

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL J. SULLIVAN,

*Petitioner,*

v.

CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

## I.

## PETITIONER HAS FAIRLY STATED ALL RELEVANT FACTS

The Respondent's attack on Petitioner's Summary of Facts is unjustified. Petitioner has consistently stated that he learned of a relationship between the trial judge's spouse and Respondent at the time of the Final Pretrial hearing in November 1988. Of course, when or how Petitioner learned of the relationship is unimportant since a Sect. 455(b) basis for disqualification cannot be waived.

Respondent's argument is based on its claim that the written waiver initialed during trial was *also* attached to the Final Pretrial Order when it was presented in November 1988. Petitioner submits that the written waiver was added to the Final Pretrial Order at the time of trial. If it *was* part of that Order in November 1988, why wasn't it typed consistent with the rest of the document or initialed by Mr. Acker, Petitioner's counsel present at the November 1988 Final Pretrial. Petitioner knows there is no handwritten waiver attached to his file copy of the Final Pretrial Order. There is no Record evidence, aside from Respondent's argument, of *when* the handwritten note was *added* to the typewritten Final Pretrial Order.

What is clear in both Summary of Facts is that:

a) Petitioner knew of the relationship in November 1988;

b) the handwritten waiver was initialed by trial counsel during trial in July 1989;

c) the Final Pretrial Order was signed by the trial judge on July 24, 1989, not in November 1988;

d) the handwritten waiver with the initials of trial counsel was made part of the Final Pretrial Order;

e) the trial judge never discussed, mentioned, or explained her spouse's relationship with Respondent at any time during the course of the litigation;

f) details of the relationship between Respondent and the trial judge's spouse have never been revealed;

g) neither Respondent nor the trial judge ever stated that the trial judge's daughter was also an attorney for Respondent.

Petitioner's Writ also attached his original Motion to Vacate (App. D, App. pg. 22) on which he states he was aware of the relationship at or about the time of the Final Pretrial in November 1988. Accordingly, the Petitioner's Summary of Facts is accurate and fair.

Petitioner wishes Respondent would be as concerned about full disclosure of its relationship with the trial judge's spouse as it professes to be about accuracy of the facts.

Respondent ignores an important issue—what are the *details* of its relationship with the spouse of the trial judge? What is Respondent hiding? If the relationship was truly minimal or insignificant, why not state the details.

Respondent's 22-page Brief in Opposition failed to, a) list the cases in which the trial court's spouse was representing Respondent, b) demonstrate any indication of the scope of the attorney/client or adviser/active participant relationship between Respondent and the trial court's spouse, and, c) reveal the amount of money paid to the trial court's spouse by Respondent during the pendency of this litigation. Yet Respondent, as well as the trial judge, know the true facts.

Instead, Respondent in Point IV argues that this Court should declare that 455(b) violations can be waived notwithstanding the clear language of the statute.

When the issue involves the integrity of justice in the United States Courts, Respondent should not be permitted to hide true facts it *knows*.

A violation of 28 U.S.C. 455(b) cannot be waived. The known facts of the relationship between Respondent and the trial court's spouse warrants review and reversal by this Court. In the alternative, other relief should be granted to determine the details of the relationship at issue.

Respectfully submitted,

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Date: May 4, 1992